TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~699~~ 67

NASHVILLE MILK COMPANY, PETITIONER,

vs.

CARNATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 19, 1957

CERTIORARI GRANTED MARCH 4, 1957

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 699

NASHVILLE MILK COMPANY, PETITIONER,

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[fol. 1] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO APPELLANT'S BRIEF

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Western Division.

Civil Action. Equitable Relief Sought.

No. 55-C-21.

NASHVILLE MILK COMPANY, a corporation, Plaintiff,

v.

CARNATION COMPANY, a corporation, Defendant.

PREFIX TO RECORD

1. Time of commencement of action: October 19, 1955.

2. Names of parties: Plaintiff-Appellant, Nashville Milk Company, a Corporation. Defendant-Appellee, Carnation Company, a Corporation.

3. Dates of filing of pleadings: Complaint, October 19, 1955. Motion to dismiss complaint, November 8, 1955.

4. Time of trial and name of judge: The case was heard and determined upon the motion to dismiss. Briefs were submitted by the respective parties and the determination by the court was upon the briefs. Hence, there was not a particular day of trial. Honorable J. Sam Perry was the District Judge.

5. Nature of judgment: The judgment sustained the motion to dismiss and dismissed the complaint.

6. Date of judgment: May 29, 1956.

7. Date of filing notice of appeal: June 22, 1956.

[fol. 3] IN THE UNITED STATES DISTRICT COURT

COMPLAINT—Filed October 19, 1955

Now comes the plaintiff, Nashville Milk Company, a corporation, and, complaining of the defendant, Carnation Company, a corporation, alleges as follows:

1. The plaintiff (sometimes hereinafter referred to as Nashville) is a corporation organized under the laws of the state of Illinois. The defendant, Carnation Company, a corporation, (sometimes hereinafter referred to as Carnation) is a corporation organized under the laws of the State of Delaware. Carnation owns and operates a factory for processing milk products, hereinafter more particularly referred to, at Morrison, Illinois, in Whiteside County, and transacts business in said county, which is within the Western Division of the United States District Court for the Northern District of Illinois. This action is brought under the provisions of Section 13-A Title 15 United States Code (Act of June 19, 1936, C. 592, Section 3, 49 Stat. 1528); Section 15 Title 15 United States Code (Act of October 15, 1914, C. 323, Section 4, 38 Stat. 731); And Section 26 Title 15 United States Code (Act of October 15, 1914, C. 323, 38 Stat. 737). Jurisdiction of this action is vested in this court under the provisions of Section 1337 Title 28 United States Code (Act of June 25, 1946, C. 646, 62 Stat. 931). All of the foregoing provisions will be hereinafter referred to according to the respective sections and titles of the United States Code.

2. Since May 1950, Nashville has manufactured evaporated milk at its factory located at Nashville, Illinois, and has sold the product in various parts of the United States, as a consequence of which it has become experienced in the manufacturing and marketing of various milk products.

[fol. 4] 3. Filled milk is a milk product customarily sold in sealed cans. The method of processing of filled milk is well known to people experienced in the manufacturing of milk products. It consists of removing butter fat from whole milk. To the milk from which butter fat has been removed, there is then added vegetable oils, such as cocoa-

nut oil or cottonseed oil, and vitamins. The product is then evaporated, that is the excess water content is removed, following which it is sterilized, cooled, and placed in sealed cans. The product so placed in sealed cans is not deleterious to the health of a person consuming it, but is a wholesome food fit for human consumption; And the filled milk manufactured and sold by Nashville, hereinafter referred to, has likewise been a wholesome food fit for human consumption and not deleterious to the health of a person consuming it; And it has been lawful under the laws of the State of Illinois to manufacture and sell filled milk during the period it has been manufactured and sold by Nashville hereinafter referred to.

4. Nashville has manufactured and sold filled milk in Illinois since April 1951. In furtherance of its purpose of manufacturing and selling filled milk Nashville had previous to April 1951, in August 1950, determined to market its filled milk product under the trade name or trade mark of "Rich Whip" and on August 18, 1950 had registered such name with the Secretary of State of Illinois under the provisions of the laws of Illinois for the registration of trade marks. In order to develop a market for the sale of Rich Whip and to gain a valuable asset of good will, Nashville began an advertising program in the latter part of 1951 giving wide publicity to Rich Whip in various advertising channels which program has continued down to the date hereof. As the result of such advertising program, the business acumen of the officers and employees of Nashville and the wholesomeness of Rich Whip for [fol. 5] human consumption, the product has been well received on the market by customers and Nashville was able to market a great quantity of it; and it became widely known and saleable in the State of Illinois and Nashville thereby gained a valuable asset of good will which it retained until the occurrence of the unlawful acts of the defendant hereinafter referred to.

5. Carnation owns all or the controlling interest in the stock of various corporations, the latter being commonly called subsidiaries. Carnation and its subsidiaries manufacture and sell various dairy products such as evaporated

milk, powdered milk, malted milk, butter, ice cream and cheese; And they own and operate among other factories, more than 30 factories for the processing of milk, which factories are located in more than 20 states; And 8 factories for the manufacturing of tin cans which are located in more than 5 states. Carnation and its subsidiaries order and cause to be shipped in interstate commerce large amounts of unprocessed dairy products and other materials used in the processing of dairy products for the purpose of processing in factories of Carnation or its subsidiaries located in states into which shipments are made from without such states; And they ship or cause to be shipped processed dairy products for sale in states both within and without the states where they were processed by Carnation or its subsidiaries. The principal office or place of business of Carnation is in the State of California from which state the management and direction of the business of Carnation and its subsidiaries in interstate commerce occurs as well as the management and direction of the manufacturing and sale of Topic hereinafter referred to.

6. On or about the month of May, 1952, Carnation began to manufacture filled milk at its factory located at Morrison, Illinois and has continued to do so until the date hereof. Previous to that time Carnation had manufactured no [fol. 6] filled milk in the State of Illinois; or if it had previously manufactured filled milk it had done so only in isolated instances or in small quantities not sufficient to give Carnation a reputation as a manufacturer of filled milk in this state. For the purpose of manufacturing filled milk and making it saleable, Carnation has brought or caused to be brought into Illinois whole milk, tin cans and carton or containers from Wisconsin and has brought or caused to be brought vegetable oils from points outside of Illinois into Illinois. Labels used on the cans containing the filled milk manufactured by Carnation have been brought, or caused to be brought, into Illinois from Ohio by Carnation. The aforesaid items so moved in interstate commerce to Carnation have been necessarily used by Carnation in its production and sale of filled milk, hereinafter referred to.

7. On or about the month of May 1952 Carnation in competition with Nashville in the sale of Rich Whip began the sale of filled milk in Illinois manufactured at its factory at Morrison as aforesaid and such sales of filled milk, so in competition with Nashville, have continued until the date hereof. The filled milk so sold by Carnation has been marketed under the trade name or trade mark of "Topic" in cans bearing the label "Topic" which labels Carnation has brought or caused to be brought into Illinois from Ohio as aforesaid. Such filled milk so marketed in Illinois, and the filled milk hereinafter referred to markefed by Carnation in Missouri, will be sometimes hereinafter referred to as "Topic".

8. Cans, whole milk, and cartons which Carnation brings or causes to be brought into Illinois from Wisconsin to its factory at Morrison comprise a common stock upon which Carnation draws for the manufacturing and shipping of Topic and evaporated milk respectively, the latter being shipped from Illinois to points outside the state as afore-[fol. 7] said. Employees of the defendant at its factory at Morrison who are employed in the manufacturing and preparation for shipment of Topic are also employed in the manufacturing and preparation for shipment of evaporated milk, such employees not being limited in their activities to but one of the aforesaid products.

9. On or about the month of February 1953, Carnation began to manufacture filled milk in a factory operated by it in the State of Missouri in which state filled milk may be lawfully manufactured and sold; And it has manufactured and sold filled milk in that state from that time to the date hereof. Previous to the aforesaid date Carnation had not manufactured or sold filled milk to the merchandising trade in that state; or if so, such manufacturing and selling had only occurred in isolated instances or in connection with the production and sale of small quantities not sufficient to give Carnation a reputation as a manufacturer or seller of filled milk in that state. The filled milk so sold by Carnation in Missouri has been marketed under the trade mark or trade name "Topic". The cans containing such filled milk bear the same or substantially

similar type labels as those sold by Carnation in Illinois. And the product sold by Carnation under the trade name or trade mark "Topie" in Missouri is the same or substantially the same as the product sold by Carnation under the same trade name in Illinois.

10. Carnation maintains two offices to promote and supervise the sale of Topic in Illinois, one located at Chicago, Illinois, and the other at St. Louis, Missouri, each having had territories in Illinois assigned to it under directions or orders given by Carnation from California to employees of Carnation at its offices at Chicago, Illinois and St. Louis, Missouri, respectively. The principal office of Carnation is in the State of California where major determinations and decisions having been made dealing with the [fol. 8] manufacturing and sale of Topic from the date Carnation began the sale of Topic in Illinois to the date hereof. Such determinations and decisions have been transmitted from time to time during the aforesaid period from employees or officers of Carnation in California to its employees at Chicago, Illinois and at Morrison, Illinois, and to employees at its offices at St. Louis, Missouri, and have included among other things, directions for the purchase of supplies used in the manufacturing of Topic, the amounts or quantity of Topic to be manufactured, the nature and extent of its advertising program, prices to be charged for the sale of Topic and matters of policy of Carnation regarding its production and sale.

11. Carnation has conducted an advertising program at Chicago, Illinois and St. Louis, Missouri by newspaper and radio advertising which has promoted the sale of Topic in both states. This program began in the aforesaid cities respectively shortly after Carnation began to sell Topic in Illinois under the supervision of its offices in each of said cities and has continued to the date hereof. Newspapers bearing such advertising have been shipped by the publishers thereof from Illinois into Indiana and Wisconsin, and from Missouri into Illinois. Sound waves carrying such advertising program have been transmitted by radio from Illinois into Indiana and Wisconsin, and from Missouri into Illinois. Such advertising program has invited

and encouraged buyers indiscriminately without regard to their residences to purchase Topic and without regard to whether such purchases of Topic be made in Illinois or Missouri or whether it be manufactured in either state; And such advertising program has materially aided and enhanced Carnation in the sale of Topic in Illinois.

Payment by Carnation of the cost of manufacturing, advertising and selling of Topic in Illinois is made by means of checks drawn by it upon banks located in California [fol. 9] which the payees thereof deposit in banks located in Missouri and Illinois and which checks are thereafter accepted for payment at the banks located in California upon which such checks are drawn by Carnation. Checks given by customers in payment of Carnation in Illinois are deposited by it in Missouri and Illinois banks. Subsequently, Carnation draws checks upon balances in said Missouri and Illinois banks and deposits them to its account with banks located in California.

13. Salesmen employed by Carnation under its supervision and direction in Missouri, enter Illinois from Missouri and take orders for Topic from Illinois customers. Orders so obtained in Illinois are then taken by the salesmen, or transmitted by the salesmen by mail or otherwise, to the office of Carnation in Missouri. Thereafter, Carnation from its office in Missouri sends directions by mail or otherwise to its factory at Morrison, Illinois, for the filling of said orders by the delivery of Topic from the aforesaid factory to the customers. Bills or invoices are prepared by Carnation at its office in Missouri and transmitted to the aforesaid factory by mail or otherwise. These bills or invoices show the names and addresses of each customer in Illinois from whom an order has been taken which is to be filled, the amount or quantity of Topic to be shipped to the customer and its selling price; and each such bill or invoice accompanies each shipment of Topic from Carnation's aforesaid factory to each customer. The practice followed by Carnation in selling and delivering Topic as averred in this paragraph began on or about February 1953 and has continued to the date hereof.

14. At divers times since Carnation has manufactured and sold Topic in Illinois, it has distributed printed adver-

tising matter in Illinois containing offers whereby any person sending labels from cans containing Topic to Carnation or a subsidiary at Los Angeles, California, would [fol. 10] be entitled to receive from Carnation, or a subsidiary, various articles of merchandise such as stockings, jewelry and kitchenware; And numerous persons have so transmitted such labels from Illinois to Carnation or a subsidiary in California and Carnation or its subsidiary has in return transmitted such articles of merchandise from California to Illinois. At divers times since Carnation has manufactured and sold Topic in Illinois, it has distributed printed advertising matter in Illinois containing offers of discounts in the sale of Topic to persons buying Topic at retail with the further offer that a retailer who would give or allow such discount would be reimbursed for the same by mailing a coupon to Carnation at Los Angeles, California; And numerous persons have received such discounts and numerous retailers have transmitted such coupons from Illinois to Carnation in California from which state Carnation has mailed remittances to retailers in Illinois to reimburse them for such discounts. All of the offers, acts and conduct of Carnation above set forth have aided Carnation in the sale of Topic in Illinois.

15. The manufacture and sale of Topic in Illinois by Carnation, has been an integrated part of the business in interstate commerce otherwise carried on by Carnation in the manufacturing and sale of other products referred to in Paragraph No. 5 hereof from the time Carnation began to manufacture and sell Topic in Illinois to the date hereof.

16. From the aforesaid date when the defendant began the sale of Topic in Illinois to the date hereof, it has violated Section 13-A Title 15 United States Code in the manner following:

> It has sold or has contracted to sell Topic in Illinois at unreasonably low prices for the purpose of destroying the competition of Nashville in its sale of Rich Whip and eliminating Nashville as a competitor in the selling of Rich Whip. Such conduct of Carnation has [fol. 11] occurred in the course of commerce within the meaning of the term "in the course of commerce" as

used in Section 13-A Title 15 United States Code through the means and methods heretofore averred by which Carnation manufactures, advertises, sells, directs the sale of and finances the sale of Topic in Illinois and by reason of the fact that such selling and manufacturing of Topic is an integrated part of the business in interstate commerce otherwise carried on by Carnation.

17. Such unlawful conduct of Carnation has been carried on by it in market areas served by Nashville in the sale of Rich Whip and with customers of Nashville and in areas where or with buyers to whom Nashville could reasonably be expected to have sold Rich Whip had it not been for such unlawful conduct of Carnation. As a direct and proximate result of such unlawful conduct, Nashville has been unable to successfully compete with Carnation in the sale of Rich Whip in Illinois and has lost numerous customers to Carnation who are attracted by unreasonably low prices charged for Topic by Carnation; and Nashville has been unable to expand its market in Illinois and gain new customers it could have reasonably expected to have without such unlawful conduct.

18. As a direct and proximate result of the aforesaid unlawful conduct of Carnation from the beginning thereof to the present time, the business of Nashville has suffered loss and damage consisting of the following: Loss of profits due to loss of customers and loss of Nashville's asset of good will in excess of $350,000. Nashville's total damages being treble damages as provided by Section 15 Title 15 United States Code, are in excess of $1,050,000.

19. The aforesaid unlawful acts of Carnation in restraint of interstate commerce are continuing ones and under Section 26 Title 15 United States Code Nashville is [fol. 12] entitled to the issuance of an injunction enjoining the continuance thereof.

20. Nashville, in order to enforce its rights against Carnation, has employed the services of attorneys and under the provisions of Section 15 Title 15 United States Code,

it is entitled to reasonable attorneys' fees for the services rendered by the attorneys in this proceeding.

Wherefore, the plaintiff prays that judgment be entered against the defendant in the amount of One Million and Fifty Thousand Dollars ($1,050,000) and that in addition there be allowed by the court to the plaintiff reasonable attorneys' fees and costs as provided by law.

The plaintiff further prays that the defendant be perpetually enjoined from its unlawful conspiracy and from continuing in the commission of its other unlawful acts above set forth.

Nashville Milk Company

By: Sherwood Dixon, George K. Ray, Edward M. Sullivan, Jerome F. Dixon, Karl Edwin Seyfarth, Its Attorneys.

Sherwood Dixon, Esquire, and George K. Ray, Esquire, of Dixon, Devine and Ray, 121 E. First Street, Dixon, Illinois.

Jerome F. Dixon, Esquire, 231 South LaSalle Street, Chicago 4, Illinois.

Edward M. Sullivan, Esquire, Amboy, Illinois.

Karl Edwin Seyfarth, Esquire, 208 South LaSalle Street, Chicago, Illinois.

[fol. 13] In the United States District Court

Motion of Defendant to Dismiss the Complaint—Filed November 8, 1955

Now comes the defendant in the above entitled cause, by its attorneys, and moves the Court to dismiss said cause for failure to state a claim upon which relief can be granted in that

1. The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce;

2. The complaint fails to allege that any sales of filled milk by the plaintiff, the defendant, or either of them was in the course of interstate commerce, or that the defendant

contracted to sell filled milk in the course of interstate commerce;

3. The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce;

4. Private action may not be maintained for a supposed violation of Section 3 of the Robinson-Patman Act (15 U. S. C. § 13a).

Ferris E. Hurd, Melville C. Williams, Attorneys for Defendant.

Ferris E. Hurd, Melville C. Williams, 120 S. LaSalle Street, Chicago 3, Illinois, Tel: RAndolph 6-6680.
Of Counsel: Pope & Ballard, 120 S. LaSalle Street, Chicago 3, Illinois, Tel: RAndolph 6-6680.

November 14, 1955.

[fol. 14] UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—May 29, 1956

This case came on to be heard upon the motion of the defendant to dismiss the complaint. This Court has carefully examined and considered the pleadings and the briefs of counsel. Contention of the defendant that relief should not be accorded the plaintiff under the provisions of the Robinson-Patman Act in view of the declared Congressional policy relative to filled milk as announced in 21 U. S. C. A. 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce, has been considered and is sustained.

Contentions of defendant that the complaint fails to state a cause of action and that a private action may not be maintained for supposed violation of Section 3 of the Robinson-Patman Act (50 U. S. C. A. 13a) have been considered and are overruled.

It is, therefore, Ordered that the complaint be and it is hereby dismissed.

Enter:

J. S. Perry, Judge.

Dated: May 29, 1956.

[fol. 15] IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Western Division.

NOTICE OF APPEAL—Filed June 22, 1956

Notice is hereby given that Nashville Milk Company, a corporation, plaintiff-appellant above named hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order or judgment entered in this cause on May 29, 1956, which dismissed the complaint.

Sherwood Dixon and George K. Ray, Edward M. Sullivan, Karl Edwin Seyfarth, Jerome F. Dixon, Attorneys for Plaintiff-Appellant.

Sherwood Dixon, and George K. Ray, Dixon, Devine and Ray, 121 East First Street, Dixon, Illinois.

Jerome F. Dixon, 231 South LaSalle St., Chicago, Illinois.

Karl Edwin Seyfarth, 208 South LaSalle St., Chicago, Illinois.

Edward M. Sullivan, Amboy, Illinois.

[fol. 16] The names and addresses of the attorneys of record for plaintiff-appellant are as follows:

Sherwood Dixon, and George K. Ray, Dixon, Devine and Ray, 121 East First Street, Dixon, Illinois.

Jerome F. Dixon, 231 South LaSalle Street, Chicago, Illinois.

Karl Edwin Seyfarth, 208 South LaSalle Street, Chicago, Illinois.

Edward M. Sullivan, Amboy, Illinois.

The names and addresses of the attorneys of record for the defendant-appellee are as follows:

Melville C. Williams, 120 South LaSalle Street, Chicago, Illinois.

Pope and Ballard, 120 South LaSalle Street, Chicago, Illinois.

[fol. 17] CLERK'S CERTIFICATE OF MAILING (omitted in printing).

[fol. 18] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 19] IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11820. September Term and Session, 1956

NASHVILLE MILK COMPANY, Plaintiff-Appellant,

v.

CARNATION COMPANY, Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

OPINION—November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is an appeal from an order dismissing the complaint herein before trial. This action was brought under § 3 of the Robinson-Patman Act (§ 13a, Title 15 U.S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation which owns and operates some 30 factories in 20 states for the processing of milk.

[fol. 20] Since May, 1952, defendant has manufactured filled milk at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of § 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. § 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* v. *Ford Motor Company*, 7. Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation of § 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question[1] and as far as we are advised, there has been no direct decision on the point by any Court of Appeals. There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balien Ice Cream Co. Inc.* v. *Arden Farms Co., et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case [fol. 21] to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex., 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balien Ice*

[1] Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 750, and Moore v. Mead's Fine Bread Co., 348 U. S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

Cream case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir., 213 F. 2d 284, 286; *Paine Lumber Company, Ltd. et al.* v. *Neal etc. et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26); Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "antitrust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "antitrust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act (Act of July 2, 1890), the Wilson Tariff Act (Act of August 27, 1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S. Code, section 4 of the Clayton Act was codified (15 U.S.C. § 12) to read: "'Antitrust laws' as used in sections 12-27 of this title (Title 15) includes sections 1-27 of this title." This was correct because sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. § 21a, § 13a and § 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of section 1 of the Clayton Act) to 12, 13, 14-21, 22-27," so that the statute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21 and 22-27 of this title includes secs. 1-27 of this title." But the codi-

[fol. 22] fiers failed to make a corresponding change in the figures 1-27 with the result upon casual inspection the term "antitrust laws" might seem to include secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* v. *United States*, 319 U.S. 423, 426.

Because section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that section 3 is not an amendment of the Clayton Act.

The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec. 2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as section 1 specifically did.

Immediately following the enacting clause, section 1 continues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws and Chapter 816, 49 Stat. 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their bills in the Senate and House, respectively. About eight [fol. 23] months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936 which incorporated the Borah-Van Nuys measure as section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902) expressly stated that only section 1 was an amendment of the Clayton Act. The report stated:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present Bill.*" (Emphasis supplied)

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.*" (Emphasis supplied)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.*" (Emphasis supplied).

[fol. 24] Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as the part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421): "Of course it is, *but it is not a part of the Clayton Act* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act. 50 *Harvard Law Review*, 106, 121-122; 85 *University of Pennsylvania Law Review*, 306, 312; 22 *Washington Law Quarterly*, 153, 159, 182; 22 *American Bar Association Journal*, 593, 649.

The Attorney General's National Committee to Study the Antitrust Laws said, on page 201 of its report of March 31, 1955:

> "We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson-Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must be and is

AFFIRMED.

[fol. 25] UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

No. 11820

NASHVILLE MILK COMPANY, Plaintiff-Appellant,

v.

CARNATION COMPANY, Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, *Eastern* DIVISION

JUDGMENT—November 1, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

[fol. 26] Clerk's certificate to foregoing record omitted in printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JAN 19 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. [redacted] 67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

KARL EDWIN SEYFARTH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

The petitioner, Nashville Milk Company, prays that a writ of certiorari issueto review the judgment of the United States Court of Appeals for the Seventh Circuit.

REFERENCE TO THE REPORT OF THE OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals, 7th Circuit, sought to be reviewed is reported in 238 F. (2) 86.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1956. No petition for rehearing was filed. The statutory provision conferring jurisdiction on the court to review the judgment of the Court of Appeals is 28 U. S. C. Sec. 1254.

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is as follows:

Is a party (here the petitioner) injured by a violation of Sec. 3 of the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. Sec. 13-A) entitled to sue the party committing the injury (here the respondent) for damages and injunctive relief under the provisions of Secs. 4 and 16 of the Clayton Act (38 Stat. 730; 15 U. S. C. Secs. 15 and 26)?

STATEMENT OF THE CASE.

1.

Summary of Proceedings in the District Court and Court of Appeals.

Petitioner filed suit for damages and injunctive relief under 15 U. S. C. Secs. 15 and 26 bottomed upon a violation by respondent of 15 U. S. C. Sec. 13-A. Respondent filed a motion to dismiss in the District Court. (Appendix record 13.) The District Court overruled the motion as to two of the grounds, but sustained it as to the third and entered judgment against petitioner dismissing the complaint. (Appendix record 14.)

Petitioner appealed to the Court of Appeals, 7th Circuit, raising as error the ground upon which the District Court had ruled adversely to it. Respondent, relying upon the proposition it might seek to sustain the judgment of the District Court on any of the grounds raised below (*Gallagher and Speck, Inc. v. Ford Motor Company*, 226 F. (2) 728, 7th Circuit (1955)), raised as error the two grounds upon which the District Court had ruled adversely to it. Thus, the case was submitted to the Court of Appeals upon three issues. The court affirmed the District

Court upon one of the issues raised by respondent, but did not pass upon the other two issues. The question presented for review by this petition is the issue determined by the Court of Appeals.

2.

Summary of the Complaint.

The complaint is set forth in full in the appendix record at pages 3-12. The following is a summary of it:

Plaintiff manufactures and sells filled milk in Illinois where filled milk may be lawfully sold. Defendant likewise manufactures and sells filled milk in Illinois. Defendant and its subsidiaries, the stock of which is owned by defendant, own and operate 30 factories in more than 20 states for the processing of filled milk. Defendant's principal office is in California from which it directs the manufacture and sale of its filled milk in Illinois. It maintains a sales office in St. Louis, Missouri with a territory in Illinois from where it conducts an advertising campaign for the sale of filled milk in the Illinois territory. Such advertising campaign consists of newspaper, radio and television advertising transmitted from Missouri into Illinois. Its salesmen enter Illinois from Missouri and take orders for filled milk. Such orders are then transmitted by the salesmen by mail or otherwise from Illinois to defendant's office in Missouri. Thereupon defendant sends directions from Missouri to its factory in Illinois for the filling of the Illinois orders. It also transmits invoices from Missouri to its Illinois factory showing the name and address of the Illinois customers and the amount of filled milk to be shipped to each customer. Defendant ships raw materials into Illinois for the manufacture of filled milk. Defendant's cost of manufacturing

and selling filled milk in Illinois is paid by checks drawn by it on California banks and delivered by it to payees in Illinois and later accepted for payment in California.

Defendant has violated 15 U. S. C. Title 13-A in that it has sold or contracted to sell its filled milk at unreasonably low prices for the purpose of destroying the competition of plaintiff in the sale of its filled milk. Such conduct has occurred in the course of commerce through the means and methods by which defendant advertises, sells and directs the sale of its filled milk in Illinois. As a direct result plaintiff has been unable to compete with defendant and has lost numerous customers to defendant attracted by its unreasonably low prices.

The complaint concludes with a demand for judgment of $1,050,000 and a prayer for injunction.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Court of Appeals for the 10th Circuit Has Reached a Conclusion Contrary to That of the Court of Appeals of the 7th Circuit.

The opinion of the Court of Appeals in the instant case was given on November 1, 1956. On November 6, 1956 the Court of Appeals of the 10th Circuit gave an opinion upon the identical question decided by the Court of Appeals of the 7th Circuit in the instant case reaching a conclusion contrary to that of the Court of Appeals of the 7th Circuit. (*Vance* v. *Safeway Stores*, No. 5366, not yet reported.)

2.

The Issue Decided by the Court of Appeals Is an Important Question of Federal Law Which Has Not Been But Should Be Settled by the Supreme Court.

The Robinson-Patman Act was passed in 1936. (49 Stat. 1526.) Since that time numerous suits for damages have been brought under Sec. 3 of that act. Only one of these cases has reached this court. (*Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, (1954).) While in that case apparently the precise issue was not involved as in the case at bar, this court, in reversing the Court of Appeals, 10th Circuit, sustained a judgment for the plaintiff based upon Sec. 3 of the Robinson-Patman Act. Some of the reported District Court cases where actions for damages have been sustained under Sec. 3 are *Hershel California Products* v. *Hunt Foods, Inc.*, 119 F. Supp. 603 (N. D. Calif., 1954); *Gordon, etc.* v. *Independent Halvah Candies*, 9 F. R. D. 700, D. C. N. Y., 1949; *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, D. C. Cal., 1950; *F and A Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, D. C. Cal., 1951. It is a reasonable assumption that many other actions have been sustained under Sec. 3, but did not require the writing of opinions by District Courts. Hence, those cases have never been reported.

In view of the foregoing the issue here is one of wide public interest. It is an important question of federal law which has not been but should be settled by the Supreme Court.

3.

The Court of Appeals Reached an Erroneous Conclusion.

Sec. 4 of the Clayton Act (15 U. S. C. Sec. 15) gives an injured party the right to sue for damages for an injury by reason of anything forbidden by the "anti-trust laws". Sec. 16 of the Clayton Act (15 U. S. C. Sec. 26) authorizes private suits for injunctive relief against threatened damage by a violation of the anti-trust laws. Sec. 1 of the Clayton Act (Title 15 U. S. C. Sec. 12) provides, in short, that the "anti-trust laws" shall include the Sherman Act, the Wilson Tariff Act and the Clayton Act itself. Sec. 1 of the Clayton Act (38 Stat. 730) refers to these three acts by their titles. In the codification of Sec. 1 of the Clayton Act reference to the titles of the acts has been omitted. (Title 15 U. S. C. Sec. 12.)

The Robinson-Patman Act (49 Stat. 1526) consists of Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), 2 (F), 2, 3 and 4. Its full context is set up in Appendix II attached to this petition.

The issue is whether Sec. 3 of the Robinson-Patman Act (15 U. S. C. Sec. 13-A) became one of the "anti-trust laws" as defined by Sec. 1 of the Clayton Act. The Court of Appeals held that it did not and hence a suit for damages and for injunctive relief could not be maintained under Secs. 4 and 16 of the Clayton Act. The Court of Appeals opinion is attached to this petition as Appendix I.

The Court of Appeals in reaching its conclusion relied upon three hypotheses upon which we shall now comment.

(A) The Court of Appeals considered that comments by Representative Miller of the Conference Committee supported its conclusion. The court took those remarks

out of context. An examination of the context of the Congressional Record shows that Representative Miller and other members of the House considered that Sec. 3 would, upon enactment of the bill, become a part of the Clayton Act. Therefore, the conclusion reached by the Court of Appeals is exactly the opposite of what is shown by the Congressional Record. In the interest of brevity of this petition, our summary of the context of the Congressional Record and pertinent remarks by Representative Miller and others appears in Appendix III attached to this petition.

B. The Court of Appeals considered that the report of the Conference Committee supported its conclusion. The report did not state either directly or indirectly that Sec. 3 was not an amendment to the Clayton Act or that Sec. 2 was the exclusive amendment of the Clayton Act. Likewise in the interest of brevity of this petition, our comments upon this aspect of the opinion of the Court of Appeals appear in Appendix III attached to this petition.

C. The Court of Appeals considered that the presence of quotation marks enclosing Sections 2 (A), 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F) and the absence of quotation marks from Secs. 2, 3 and 4 established that only the portions of the bill included in the quotation marks amended the Clayton Act.

We submit that whether Sec. 3 of the Robinson-Patman Act amended the Clayton Act and thus became a part of it is not to be determined by the presence or absence of quotation marks. Rather it is to be determined from the intent of Congress measured by the nature and character of the entire bill, and the affinity and relationship of the sections of the bill to each other and to the Clayton Act. For Sec. 3 to have been an amendment to the Clayton Act it need not have been so labeled. A law is amended when

it is permitted to remain and something is added or taken from it or it is in some way altered to better accomplish its purpose (*U. S.* v. *Lapp*, 244 Fed. 377-383, 6th Circuit (1917); *Vance* v. *Safeway Stores*, No. 5366, 10th Circuit, not yet reported).

Whether an act is amendatory of a prior act is to be determined by a comparison of their provisions and its character is not determined by the fact it does or does not profess to be an amendment (*Rubert Hermanos* v. *People of Puerto Rico*, 106 Fed. (2) 754-759, (1939), reversed on other grounds 309 U. S. 543 (1940).

Sec. 2 of the Clayton Act, prior to its amendment by the Robinson-Patman Act, made it unlawful to discriminate in price between different purchasers of commodities where the effect of such discrimination may be to substantially lessen competition or create a monopoly in any line of commerce. Sec. 2 (A) of the Robinson-Patman Act amended Sec. 2 in some particulars, but retains the foregoing provision relating to discrimination. Without going into all of the details of Secs. 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F), they forbid the giving of discounts except for services rendered, paying a customer for services or facilities without availing the same to all customers, forbidding discriminations in connection with the furnishing of services or inducing or receiving a price discrimination.

Sec. 3 of the Robinson-Patman Act makes it unlawful to discriminate against competitors of the purchaser in giving a rebate, discount or advertising service not available to such competitors; or to sell goods at lower prices in one section of the United States than in another, to destroy competition; or to sell goods at unreasonably low prices for the purpose of destroying competition.

It is clear that the entire Robinson-Patman Act has done no more than to widen the horizon of original Sec.

2 of the Clayton Act in dealing with monopolistic practices. All sections of the Robinson-Patman Act are integrated and inter-related parts of the whole. All of them deal with phases of monopolistic practices of the same general nature The purpose of the Robinson-Patman Act is to reach the operations of large interstate businesses in competition with small local concerns (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231-238 (1951)) and to protect small business unable to buy in quantities. (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37-49) (1948.) The Act barred the use of interstate business to destroy local business (*Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115-120) (1954).

We submit that by widening and extending original Sec. 2 of the Clayton Act through the adoption of Sec. 3 of the Robinson-Patman Act in company with its interrelated provisions in Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F), Congress clearly spoke its intention that Sec. 3 should become a part of the Clayton Act.

Respectfully submitted,

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APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11820. September Term and Session, 1956.

Nashville Milk Company,
Plaintiff-Appellant,

v.

Carnation Company,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is an appeal from an order dismissing the complaint herein before trial. This action was brought under § 3 of the Robinson-Patman Act (§ 13a, Title 15 U. S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation

which owns and operates some 30 factories in 20 states for the processing of milk.

Since May, 1952, defendant has manufactured filled milk at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of § 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. § 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* v. *Ford Motor Company*, 7 Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation

of § 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question[1] and as far as we are advised, there has been no direct decision on the point by any Court of Appeals. There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balian Ice Cream Co. Inc.* v. *Arden Farms Co., et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex., 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balian Ice Cream* case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir., 213 F. 2d 284, 286; *Paine Lumber Company, Ltd. et al.* v. *Neal etc. et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26): Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "antitrust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "antitrust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act

1 Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 750, and *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

(Act of July 2, 1890), the Wilson Tariff Act (Act of August 27, 1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S. Code, section 1 of the Clayton Act was codified (15 U.S.C. § 12) to read: "'Antitrust laws' as used in sections 12-27 of this title (Title 15) includes sections 1-27 of this title." This was correct because sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. § 21a, § 13a and § 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of section 1 of the Clayton Act) to 12, 13, 14-21, 22-27," so that the statute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21 and 22-27 of this title includes secs. 1-27 of this title." But the codifiers failed to make a corresponding change in the figures 1-27 with the result upon casual inspection the term "antitrust laws" might seem to include secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* v. *United States*, 319 U.S. 423, 426.

Because section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that section 3 is not an amendment of the Clayton Act.

The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec. 2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as section 1 specifically did.

Immediately following the enacting clause, section 1 continues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws and Chapter 816, 49 Stat. 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their

bills in the Senate and House, respectively. About eight months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936 which incorporated the Borah-Van Nuys measure as section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902) expressly stated that only section 1 was an amendment of the Clayton Act. The report stated:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present Bill.*" (Emphasis supplied)

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way in-

consistent with the *provisions of the Clayton Act amendment provided for in section 1.*" (Emphasis supplied)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.*" (Emphasis supplied).

Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as the part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421): "Of course it is, *but it is not a part of the Clayton Act* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act. 50 *Harvard Law Review*, 106, 121-122; 85 *University of Pennsylvania Law Review*, 306, 312; 22 *Washington Law Quarterly*, 153, 159, 182; 22 *American Bar Association Journal*, 593, 649.

The Attorney General's National Committee to Study the Antitrust Laws said, on page 201 of its report of March 31, 1955:

"We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly

dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson-Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must be and is

AFFIRMED.

APPENDIX II.

THE ROBINSON-PATMAN ACT.

49 Stat. 1526.

[Public—No. 692—74th Congress.]

[H.R. 8442.]

AN ACT.

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

"Sec. 2 (a) That *it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the

discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce, to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Sec. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to

such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Sec. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

APPENDIX III.

A.

Summary of Remarks by Representative Miller and Others.

When the remarks of Representative Miller quoted in the opinion of the Court of Appeals are read in context they show that the subject of discussion was the effect of the criminal provision of Sec. 3 of the Robinson-Patman Act and whether it applied to that section only. The full discussion shows that Sec. 3 was considered part of the Clayton Act. Following the statement of Representative Miller quoted by the Court of Appeals and on the same page of the Congressional Record (80 Cong. Rec. 9421) the following appears (all emphasis supplied):

> Mr. Massingale: Does the bill agreed to by the conferees *carry the penalty of triple damages and also a penalty under the criminal law?*
>
> Mr. Miller: The penalty of criminal damages is the old law. In other words we made no change in that particular provision of the Clayton Act. Section 3 which the gentleman from New York talks about is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of the bill has nothing to do with criminal offenses. It deals primarily with the authority of the Federal Trade Commission to regulate and enforce the provisions of section 2 of the Clayton Act as amended. *Sec. 3 of the bill is placed in an effort to make the criminal offense apply only to that particular section*, and I believe that is a reasonable construction if you will look at the bill.
>
> Mr. Massingale: That is no criminal offense involved for anything outside of what is contained in that section?

Mr. Miller: In section 3.

Mr. Hancock: Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime *and is also subject to triple damages to anyone who claims to be aggrieved?*

Mr. Miller: That is true, but the criminal part is included in section 3 and section 3 only.

It also bears comment that on the preceding page of the Congressional Record (p. 9420) Representative Celler, a member of the Conference Committee, made the following statement:

> "Also let me point out that *this bill is an amendment to the Clayton Act*, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of discrimination. *In addition, for the same act of discrimination, to the triple damages* the business man accused can, by section 3 of this bill be hauled to court and fined $5,000 or imprisoned for one year."

On the same page of the Congressional Record it appears that Rep. Celler was asked by Rep. Hancock whether a vendor guilty of a discrimination would "be subject to the aggrieved party for damages, or has he committed a crime and subjected himself to a penalty?" Rep. Celler replied that if he violated the Borah-Van Nuys provision he would be subject to criminal penalties. Rep. Hancock then asked whether he would also be liable for triple damages. Rep. Celler replied, "*and he would have to respond in triple damages under the provisions of the Clayton Act.*" (All emphasis supplied.)

B.

COMMENTS UPON THE REFERENCES OF THE COURT OF APPEALS TO THE CONFERENCE COMMITTEE REPORT.

The Robinson-Patman Act consists of Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), 2 (F), 2, 3 and 4. (See Appendix II.) Sec. 2 (A) retains the substance of Sec. 2 of the Clayton Act. The substance of Secs. 2 (A), 2 (B), 2 (C), 2 (E), and 2 (F) is set forth in the petition. Sec. 2 provides that nothing "herein contained" shall effect rights of action or litigation pending or orders of the Federal Trade Commission based on Sec. 2 of the Act of October 15, 1914 (Clayton Act). The substance of Sec. 3 is set forth in the petition. Sec. 4 is an exemption of co-operative associations from the Act for the return of net earnings or surplus to members.

The opinion of the Court of Appeals quotes the portion of the Conference Committee report relating to Sec. 2 as follows (with italics supplied by the court):

"SECTION 2."

> "The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present bill.*"

The portion of the report given in italics by the court is to be interpreted by keeping in mind the provisions of the two sections of the bill to which the report referred. It will be remembered that Sec. 2 dealt with pending actions. Sec. 2 (A) made the same conduct unlawful that had previously been unlawful under Sec. 2 of the Clayton and,

additional matter was added in Secs. 2 (B), 2 (C), 2 (D), 2 (E) and 2 (F) that had not been unlawful under Sec. 2 of the Clayton Act.

The only reasonable interpretation of the report is that the Committee was giving an explanation of why the subject matter of Sec. 2 had been included in a separate section. The matter in Sec. 2 was of a temporary nature only and was therefore given separately from Sec. 1 of the bill (Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), and 2 (F)) because the latter dealt with the Clayton Act and the former (Sec. 2) being of a temporary purpose only should not be commingled with the permanent provisions to be in the Clayton Act as amended. *The report did not state either directly or indirectly that Sec. 1 (Secs. 2 (A), 2 (B), 2 (C), 2 (D), 2 (E), and 2 (F)) was the sole and exclusive amendment in the bill to the Clayton Act.*

The opinion of the Court of Appeals also quotes the portion of the Conference Committee report relating to Sec. 3 as follows (with italics supplied by the court):

"SECTION 3."

> "Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.*"

The report stated that Sec. 2 of the bill contained the operative provisions of what had been the Borah-Van Nuys bill; that while they overlap in some respects they were not inconsistent with the provisions of the Clayton Act Amendment provided in Section 1. *Again, the Committee did not*

state Sec. 1 of the bill (Sec. 2 (A)) was the sole and exclusive amendment to Sec. 2 of the Clayton Act. It merely stressed the fact that there was no inconsistency between the two sections. The report then continued that Sec. 3 authorized nothing permitted by the amendment found in Sec. 1 of the bill and took nothing from it. All that the report professed to do was to harmonize Secs. 1 and 3 of the bill, showing that they neither overlapped nor were inconsistent.

The most significant thing about the report *is that nowhere does it state that Sec. 3 is not a part of the Clayton Act.* For a Conference Committee to recommend that Congress pass an act which, as we have already seen, in all of its parts widened the horizon of the Clayton Act and not to have called the attention of Congress in express words that one of the sections in the bill (Sec. 3) though playing a vital role in the widening of the Clayton Act was not a part of that Act but an independent enactment is both unreasonable and unrealistic.

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FILED
AUG 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. [redacted]67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

BRIEF OF NASHVILLE MILK COMPANY, PETITIONER.

KARL EDWIN SEYFARTH,
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NOTE: (Because of the numerous references in the brief to the sections of the Robinson-Patman Act and various sections of the Clayton Act, references to those sections here have been omitted.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 699.

NASHVILLE MILK COMPANY,

Petitioner,

vs.

CARNATION COMPANY,

Respondent.

BRIEF OF NASHVILLE MILK COMPANY, PETITIONER.

REFERENCE TO THE REPORT OF OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals, 7th Circuit, sought to be reviewed is reported in 238 F. (2d) 86.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1956. No petition for rehearing was filed. The statutory provision conferring jurisdiction on the court to review the judgment of the Court of Appeals is 28 U. S. C. Sec. 1254(1). The petition for certiorari was filed January 19, 1957 and was granted March 4, 1957.

STATUTE WHICH THE CASE INVOLVES.

The statute which this case involves is Sec. 3 of the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. Sec. 13-A) which reads as follows:

> "Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competititon or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is as follows:

Is a party (here the petitioner) injured by a violation of Sec. 3 of the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. Sec. 13-A) entitled to sue the party committing the injury (here the respondent) for damages and injunctive relief under the provisions of Secs. 4 and 16 of the Clayton Act (38 Stat. 730; 15 U. S. C. Secs. 15 and 26)?

STATEMENT OF THE CASE.

I.

SUMMARY OF PROCEEDINGS IN THE DISTRICT COURT AND COURT OF APPEALS.

Petitioner filed suit for damages and injunctive relief under 15 U. S. C. Secs. 15 and 26 bottomed upon a violation by respondent of 15 U. S. C. Sec. 13-A. Respondent filed a motion to dismiss in the District Court. (R. 10.) The District Court overruled the motion as to two of the grounds, but sustained it as to the third and entered judgment against petitioner dismissing the complaint. (R. 11.)

Petitioner appealed to the Court of Appeals, 7th Circuit, raising as error the ground upon which the District Court had ruled adversely to it. Respondent, relying upon the proposition it might seek to sustain the judgment of the District Court on any of the grounds raised below (*Gallagher and Speck, Inc.* v. *Ford Motor Company*, 226 F. (2) 728, 7th Circuit, (1955), raised as error the two grounds upon which the District Court had ruled adversely to it. Thus, the case was submitted to the Court of Appeals upon three issues. The court affirmed the judgment of the District Court upon one of the issues raised by respondent, but did not pass upon the other two issues. The question presented for review by this petition is the issue determined by the Court of Appeals.

2.

SUMMARY OF THE COMPLAINT.

The complaint is set forth in full in the record at pages 2-10. The following is a summary of it:

Plaintiff manufactures and sells filled milk in Illinois where filled milk may be lawfully sold. Defendant likewise manufactures and sells filled milk in Illinois. Defendant and its subsidiaries, the stock of which is owned by defendant, own and operate 30 factories in more than 20 states for the processing of filled milk. Defendant's principal office is in California from which it directs the manufacture and sale of its filled milk in Illinois. It maintains a sales office in St. Louis, Missouri with a territory in Illinois from where it conducts an advertising campaign for the sale of filled milk in the Illinois territory. Such advertising campaign consists of newspaper, radio and television advertising transmitted from Missouri into Illinois. Its salesmen enter Illinois from Missouri and take orders for filled milk. Such orders are then transmitted by the salesmen by mail or otherwise from Illinois to defendant's office in Missouri. Thereupon defendant sends directions from Missouri to its factory in Illinois for the filling of the Illinois orders. It also transmits invoices from Missouri to its Illinois factory showing the name and address of the Illinois customers and the amount of filled milk to be shipped to each customer. Defendant ships raw materials into Illinois for the manufacture of filled milk. Defendant's cost of manufacturing and selling filled milk in Illinois is paid by checks drawn by it on California banks and delivered by it to payees in Illinois and later accepted for payment in California.

Defendant has violated 15 U. S. C. Title 13-A in that it has sold or contracted to sell its filled milk at unreasonably

low prices for the purpose of destroying the competition of the plaintiff in the sale of its filled milk. Such conduct has occurred in the course of commerce through the means and methods by which defendant advertises, sells and directs the sale of its filled milk in Illinois. As a direct result plaintiff has been unable to compete with defendant and has lost numerous customers to defendant attracted by its unreasonably low prices.

The complaint concludes with a demand for judgment of $1,050,000 and a prayer for injunction.

SUMMARY OF ARGUMENT.

I. Identical bills were introduced in the Senate (S. 3154) and the House (H. R. 8442). Each bill was amended and passed in the respective branch of Congress in which it was introduced. The Senate refused to concur in the House bill. A Conference Committee was appointed and the Senate and House adopted the report of the committee, which is the Robinson-Patman Act consisting of four sections. Sec. 3 had its origin in the Borah-Van Nuys amendment to S. 3154, later adopted by the Conference Committee as Sec. 3. Remarks by Senator Borah disclose that he intended that a violation of the amendment he offered was to afford the injured party a suit for damages. Remarks by members of the House upon consideration of the Conference Committee report similarly interpreted Sec. 3.

II. The entire Robinson-Patman Act amended the Clayton Act and has done no more than to widen the horizon of original Sec. 2 of the Clayton Act in dealing with monopoly. This conclusion is supported by the nature of the Robinson-Patman Act, all sections being integrated and inter-related parts of a whole dealing with monopolistic practices of the same general nature. The conclusion is also supported by Sec. 2 of the act which describes the act as "this amendatory Act." A law is amended when it is permitted to remain and something is added to it to better accomplish its purpose.

III. The House Judiciary Committee has been charged by an act of Congress with this duty of supervising the preparation of the U. S. Code. In the 1940 and subsequent Codes, Sec. 3 of the Robinson-Patman Act was included in the Clayton Act as one of the anti-trust laws as defined

by that act. That constitutes an administrative construction that Sec. 3 became part of the Clayton Act, and Congress having passed no legislation to reject such construction, it is entitled to great weight.

IV. In *Bruces Juices* v. *American Can Co.*, 330 U. S. 743, 1947, this court construed Sec. 3 of the Robinson-Patman Act as giving a party injured by its violation the right to sue and recover treble damages. In the case of *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, this court approved a judgment in a treble damage suit based upon a violation of Sec. 3. While in neither case was the issue directly raised that Sec. 3 is not a part of the Clayton Act and the court's construction may be dictum, Congress has not by legislation rejected such construction. Neither has Congress rejected a similar construction by the District Courts over a long period. This is strong evidence that Congress has approved it.

ARGUMENT.

HOW THE ISSUE HAS ARISEN.

Sec. 4 of the Clayton Act (15 U. S. C. Sec. 15) gives an injured party the right to sue for damages for an injury by reason of anything forbidden by the "anti-trust laws". Sec. 16 of the Clayton Act (15 U. S. C. Sec. 26) authorizes private suits for injunctive relief against threatened damage by a violation of the anti-trust laws. Section 1 of the Clayton Act provides, in short, that the "anti-trust" laws shall include the Sherman Act, the Wilson Tariff Act and the Clayton Act, describing each act by its title. In the first code (1926) all sections of these three acts were given code section numbers. Sec. 1 became code section number 12 of Title 15. In that code Sec. 12, instead of describing these three acts by their titles, described them by the code section numbers. In the code, the respective sections of these acts appeared in Sections 1-27. In Sec. 12 of the 1926 code to which we have just referred, the anti-trust laws were described as follows: "Anti-trust laws, as used in Sections 12-27 of this title" (Title 15), includes Sections 1-27 of this title." The only change of Sec. 12 of the 1926 code made by any other code was in 1940 when Sec. 12 was made to read as follows: "Anti-trust laws as used in Sections 12, 13, 14-21 and 22-27 of this title, includes sections 1-27 of this title." Sec. 12 has been continued in subsequent codes in the same form given in 1940. It is to be observed that no change has been made in any code of the words "includes 1-27 of this title."

The Robinson-Patman Act (49 Stat. 1526) consists of Sec. 1 (consisting of Paragraphs A, B, C, D, E and F) purporting to amend Sec. 2 of the Clayton Act; and Sections

2, 3 and 4. Its full context is set up in Appendix I attached to this brief. The 1940 code, and all subsequent codes, have included all sections of the Robinson-Patman Act between Secs. 1 to 27. This was done by giving code section number 13 to Sec. 2 as amended by Sec. 1 of the Robinson-Patman Act; code section number 21-A to Sec. 2 of the Robinson-Patman Act; code section number 13-A to Sec. 3 of the Robinson-Patman Act; and code section number 13-B to Sec. 4 of the Robinson-Patman Act.

The history of the Robinson-Patman Act will be more fully described later. All sections of the act were adopted under one title and one enacting clause. (See Appendix I.) The issue is whether Sec. 3 of the Robinson-Patman Act became one of the "anti-trust laws" as defined by Sec. 1 of the Clayton Act. The Court of Appeals held it did not and hence a suit for damages and injunctive relief could not be maintained under Secs. 4 and 16 of the Clayton Act which was bottomed upon Sec. 3 of the Robinson-Patman Act.

I.

The Remarks Made by Members of Congress When the Robinson-Patman Act Was Being Considered Show That It Was the Intention of Congress That a Person Injured by a Violation of Sec. 3 Has a Cause of Action for Damages. There Is Nothing in the Report of the Conference Committee to the Contrary.

Appendix II hereto attached gives the Congressional History of the Robinson-Patman Act, with references to the Congressional Record. Appendix III hereto attached sets forth relevant comments of members of the House and Senate when the legislation was being considered, with references to the Congressional record. These mat-

ters have been set forth in appendices rather than in the body of the brief in the interest of brevity.

In the 74th Congress, Senator Robinson introduced a bill in the Senate, S. 3154. (Ap. II.) Representative Patman introduced an identical bill in the House, H. R. 8442. (Ap. II.) The Senate adopted a Committee amendment of its bill. It also adopted an amendment of the Committee bill offered by Senator Borah known as the Borah-Van Nuys amendment. (Ap. II.) The bill as so amended passed and was sent to the House. (Ap. II.) Likewise the House adopted a Committee amendment, passed its bill and sent it to the Senate, without acting on the Senate bill. (Ap. II.) The Senate amended the House bill. It agreed to a motion to insist on its amendment to the House bill and ask for a conference. (Ap. II.) The Vice-President appointed Senators Logan, Van Nuys, McGill, Borah and Austin, as conferees. (Ap. II.) The House agreed to the conference and the Chair appointed Representatives Utterback, Miller, Celler, McLaughlin, Summers, Guyer and Robinson as conferees. (Ap. II.) The Conference Committee report was agreed upon by the House and the Senate. (Ap. II.)

The amendments to S. B. 3154 occurred in the Senate in this way. Committee on Judiciary reported the bill with amendments. (Ap. II.). Senator Borah offered an amendment to the bill as amended by the Committee which he stated he offered as a separate section to S. 3154. (Ap. II.) The Committee amendments and Senator Borah's amendment (the latter known as the Borah-Van Nuys amendment) were adopted. (Ap. II.) The bill passed as amended and was sent to the Senate in that form.

The Borah-Van Nuys amendment is set forth in Appendix IV. It consisted of three paragraphs. A comparison of its provisions with Sec. 3 of the Robinson-Patman Act discloses that its first and third paragraphs are identical with the

first and second paragraphs respectively of Section 3 of the Robinson-Patman Act. The second paragraph of the Borah-Van Nuys amendment and Sec. 4 of the Robinson-Patman Act are substantially the same. These observations are confirmed by the report of the Conference Committee. (80 Cong. Rec. 9414-9415.)

The Court of Appeals was of the opinion that "The legislative history is convincing that there was no intention by Congress for Section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act." In reaching this conclusion the court relied upon (1) remarks made by two of the members of the House when that body was considering the Conference Committee report and (2) the report of the Conference Committee. We submit that remarks made by members of the House and Senate clearly establish that it was intended by Congress that a remedy by a civil suit for damages was to be afforded to one injured by a violation of Sec. 3 of the Robinson-Patman Act. We further submit that the Conference Committee report furnishes no basis for the conclusion reached by the Court of Appeals. These questions will now be discussed in the order just given.

1.

Since the Borah-Van Nuys amendment eventually became Sec. 3 of the Robinson-Patman Act, absent its second paragraph only, the remarks of Senator Borah, its sponsor, at the time he submitted it are pertinent. (He was later one of the conferees of the Conference Committee.) The relevant parts of these remarks are given in Appendix III-A. They disclose that the purpose of the Borah-Van Nuys amendment was to inhibit conduct as a matter of law "without the intervention of the discretionary power of the Federal Trade Commission or other bureau." Senator Borah further stated, "That, it seems to us, should be

proi:bited as a matter of law and that there need not be any discretion laid anywhere with reference to the execution of that kind of law. That is the distinction between the bill which is now pending and the proposed amendment."

Senator Logan was Chairman of the Sub-committee which had considered S. 3154 and had reported the bill to the Senate on behalf of the Committee on Judiciary. Near the conclusion of Senator Borah's remarks given in explanation of this amendment, the following colloquy occurred (with emphasis supplied):

> "Mr. Logan: *Mr. President, may I interrupt the Senator to ask whether it is unusual to provide, for violation of a statute, a criminal prosecution and also a right to sue for damages? The two are not inconsistent.*
>
> Mr. Borah: *No; we have such a provision in the Sherman anti-trust law.*
>
> Mr. Logan: *That is what I thought.*"

From the foregoing it is clear that there was no question in the mind of either Senator but that a violation of the Borah-Van Nuys amendment would give the injured party the right to sue for damages.

When the Conference Committee report was being considered in the Senate an inquiry was made by Senator Vandenberg of Senator Van Nuys. (Ap. III-C.) The latter had been a co-sponsor of the Borah-Van Nuys amendment and was one of the conferees of the Conference Committee. In his inquiry Senator Vandenberg said that "The fact has been called to my attention that Section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine *and also subject to treble damages.*" (Emphasis supplied.) He then stated that similar discriminations under Section 2 (B) would be subject to rebuttal by showing that a reduced price was made in good

faith to meet competition. His concern was whether a defense allowed by Sec. 2-B would not be available under Sec. 3. In his reply Senator Van Nuys did not question Senator Vandenberg's statement that Sec. 3 made discriminations under Sec. 3 "subject to treble damages."

He merely stated that the provision to which Senator Vandenberg referred was "simply a rule of evidence rather than a part of the substantive law." It is significant that an examination of the Congressional record discloses that no Senator challenged Senator Vandenberg's statement with reference to discriminations under Sec. 3 being subject to treble damages.

Relevant remarks in the House made when the Conference Committee report was being considered are set forth in Appendix HH-B. In the interest of brevity they will not be repeated here. We submit that a reading of that appendix clearly shows that the members of the House who participated in the discussion considered that a party injured by a violation of Sec. 3 would have a cause of action for damages.

2.

The position of the Court of Appeals that the report of the Conference Committee discloses that Congress did not intend for Sec. 3 to be an amendment of the Clayton Act is not supported by the report.

Nowhere in the report of the Conference Committee upon this important item of legislation is there a syllable to indicate that Sec. 3 was not to amend the Clayton Act. That the entire bill is an amendment of the Clayton Act is discussed by us in the following part of this brief. Here we concern ourselves with the Court of Appeals position that evidence is to be found in the report that the Clayton Act was not amended by Sec. 3.

The report given by the managers on the part of House (80 Cong. Rec. 9414-9415) begins by stating that they were submitting a statement with regard to the conference on the disagreement of the two houses upon H. R. 8442, "to amend Section 2 of the act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes", approved October 15, 1914, as amended (U. S. C. Title 15, Sec. 13) and for other purposes." The report then states that "The first section of the House bill and the Senate amendment amend Section 2 of the Clayton Act and divide said Section 2 into a number of subsections. The subsections hereinafter mentioned, therefore, refer to the subsections into which it is proposed to divide Section 2 of the Clayton Act." The report then discusses the nature of the Subsections. Section 2 of the act, the report states, relates to pending rights of action "and being therefore temporary in purpose, it appears in the conference report as Section 2 of the bill itself, rather than as part of the amendment to Section 2 of the Clayton Act, which is provided in Section 1 of the present bill." Coming to Sec. 3, the report states that "It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill. While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in Section 1."

The Court of Appeals considered that because the report stated (as just quoted) that Sec. 1 of the bill was an amendment to the Clayton Act, it follows that Sec. 3 was not an amendment to the Clayton Act.

The difficulty with the position as taken by the Court of Appeals is that nowhere did the report exclude Sec. 3 as being an amendment to the Clayton Act. It is plain that the report by its Clayton Act references which we have given merely calls attention to the fact that Sec. 1 of the bill is that part that amends Sec. 2; and that it was accom-

plished by dividing Sec. 2 into a number of paragraphs. The report does no more than thus emphasize that Secs. 2, 3 and 4 are not substitutes or replacements for what had been *in Sec. 2 of* the Clayton Act; but that Sec. 2 of the Clayton Act was being replaced by what was to be found in Sec. 1 of the bill. In addition, the report harmonizes Sec. 1 of the bill and Sec. 3 by pointing out that while there may be overlapping in some respects, there was no inconsistency with those provisions of Sec. 2 of the Clayton Act which were to be amended by Sec. 1 of the bill.

We submit that it is wholly unwarranted to construe the report as excluding Sec. 3 from being an amendment to the Clayton Act.

II.

That the Entire Robinson-Patman Act Amended the Clayton Act Is Clear from the Robinson-Patman Act Itself.

The Court of Appeals concluded that because the enacting clause of the Robinson-Patman Act purports to amend only Sec. 2 of the Clayton Act; and only Sec. 1 of the Robinson-Patman Act (which section amends Sec. 2 of the Clayton Act) is enclosed by quotation marks, it follows that the Clayton Act was not amended by Sec. 3.

It is important to observe that both in the bill reported by the Conference Committee (80 Cong. Rec. 9413) and in the act itself as finally passed (Appendix I) not only were quotation marks excluded from Sec. 3, but also from Secs. 2 and 4. Thus, the only section included with quotation marks is Sec. 1.

It follows that if the use of the enacting clause purporting to amend only Sec. 2 of the Clayton Act and the presence of quotation marks only in connection with amended Sec. 2 of the Clayton Act set forth in Sec. 1 of the bill had the effect of excluding Sec. 3 as amendatory

of the Clayton Act, then Secs. 2 and 4 of the act in question are for the same reason, not amendatory of the Clayton Act. Manifestly that is not the case, because Secs. 2 and 4 of the Robinson-Patman Act are so intimately related to Sec. 2 of the Clayton Act, as amended by Sec. 1, that they are necessarily amendatory of the Clayton Act. Sec. 2 of the Robinson-Patman Act provides that "nothing herein contained" shall effect litigation pending, or orders of the Federal Trade Commission based on Sec. 2 of the Clayton Act, arising or entered prior to the effective date of "this amendatory Act." Sec. 4 is an exemption for cooperative associations which might otherwise be subject to Sec. 2 of the Clayton Act as amended by Sec. 1 of the Robinson-Patman Act. Clearly these sections are amendatory of the Clayton Act.

The first sentence of Sec. 2 of the Robinson-Patman Act, in referring to that act, uses the phrase, "*this amendatory Act*" (emphasis supplied). A proviso then follows in which the phrase "this amendatory Act" is used three times. Better evidence could not be found as to the nature of the act than by these deliberate words of Congress.

Not only did Congress call the act "this amendatory Act" in so many words, but the nature of the Act itself gives rise to the conclusion that the entire act is amendatory of the Clayton Act.

Sec. 2 of the Clayton Act, prior to its amendment by Sec. 1 of the Robinson-Patman Act, made it unlawful to discriminate in price between different purchasers of commodities where the effect of such discrimination might be to substantially lessen competition or create a monopoly in any line of commerce. Paragraph A of Sec. 1 of the Robinson-Patman Act amended Sec. 2 in some particulars, but retains the foregoing provision relating to discrimination. Without going into all of the details of Paragraphs B, C, D, and F, they forbid the giving of discounts except

for services rendered, paying a customer for services or facilities without availing the same to all customers; forbidding discriminations in connection with the furnishing of services or inducing or receiving a price discrimination.

Sec. 3 of the Robinson-Patman Act makes it unlawful to discriminate against competitors of the purchaser in giving a rebate, discount or advertising service not available to such competitors; or to sell goods at lower prices in one section of the United States than in another to destroy competition; or to sell goods at unreasonably low prices for the purpose of destroying competition.

It is clear that the entire Robinson-Patman Act has done no more than to widen the horizon of original Sec. 2 of the Clayton Act in dealing with monopolistic practices. All sections of the Robinson-Patman Act are integrated and inter-related parts of the whole. All of them deal with phases of monopolistic practices of the same general nature. The purpose of the Robinson-Patman Act is to reach the operations of large interstate businesses in competition with small local concerns (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231-238 (1951)), and to protect small business unable to buy in quantities. (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37-49 (1948).) The act barred the use of interstate business to destroy local business. (*Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115-120 (1954).)

That Congress did not specifically state that Sec. 3 was amendatory of the Clayton Act by naming the Clayton Act as being the act so amended does not foreclose Sec. 3 from having become a part of that act by amendment. We have already shown that in Sec. 2 Congress used the phrase "this amendatory Act" four times. That the act so amended was the Clayton Act, there can be no doubt for the reasons just given. A law is amended when it is permitted to remain and something is added or taken from

it or it is in some way altered to better accomplish its purpose. (*U. S.* v. *Lapp*, 244 Fed. 377-383, 6th Circuit, 1917.) Any change of the scope or effect of an existing statute, whether by addition, omission or substitution of provisions which does not wholly terminate its existence, whether by an act purporting to amend, or by an act original and independent in form, is treated as an amendment. (Sutherland Statutory Construction, 3rd Ed., 1943, Sec. 1901.) Whether an act is amendatory of a prior act is to be determined by a comparison of their provisions and its character is not determined by the fact that it does or does not profess to be an amendment. (*Rubert Hermanos* v. *People of Puerto Rico*, 106 F. (2) 754-759, First Circuit, 1939, reversed on other grounds, 309 U. S. 543, 1940.)

Supplemental statutes include every species of amendatory legislation which go to complete a legislative scheme. (*Rahway Savings Institution* v. *Rahway*, 53 N. J. Law 48, 20 At. 756-757, 1890; *First State Bank of Shelby* v. *Bottineau*, 56 Montana 363, 185 Pac. 162-164, 1919.)

The case of *First State Bank of Shelby* v. *Bottineau*, just cited, involved an issue similar upon principle with the issue here. Congress passed a homestead act in 1862. (12 Stat. 392.) It contained a provision exempting land granted under its provisions from any debt of the owner contracted prior to the issuance of the patent. In 1909, Congress passed an act entitled the "Enlarged Homestead Act." (35 Stats. at Large 639.) This act had no debt exemption provision. Neither in the title nor in the body of the act was it recited that it was an amendment of the 1862 act. The Montana Supreme Court in a well reasoned opinion held that the 1909 act amended and supplemented the 1862 act and that one who received a patent under the 1909 act was therefore entitled to the benefit of the exemption provision of the 1862 act. The conclusion of the court

was based upon the reasoning that whether an act of Congress is an amendment of an earlier act is to be determined from the intent of Congress under all the facts and circumstances that led to its passage; and that there, clearly Congress had such intention.

That all the sections of the Robinson-Patman Act are integrated parts of the whole is plain. We have already shown the relationship of Secs. 2 and 4; and the relationship between Sec. 1 (amending Sec. 2 of the Clayton Act) and Sec. 3. Sec. 4, exempting co-operatives, applies indifferently to Secs. 1 and 3. Thus, all sections of the act are inter-related.

We submit that all sections of the Robinson-Patman Act in their entirety amended the Clayton Act. Since Sec. 3 amended the Clayton Act it has certainly supplemented it in dealing with the subject of monopoly. Being a part of the Clayton Act by amendment, Sec. 3 is thus one of the "anti-trust laws" defined by Sec. 1 of that act; and a cause of action against one who violated Sec. 3 will therefore lie under Sec. 4 of the Clayton Act. Where an act is amended by a later act, the act so amended is to be read as if it had originally been in the amended form. (*Blair* v. *Chicago*, 201 U. S. 400-475, 1906; *Pennsylvania Co.* v. *U. S.*, 236 U. S. 351-362, 1915; *U. S.* v. *La France*, 282 U. S. 568-576, 1931.)

III.

The House Judiciary Committee Has, in the 1940 and Subsequent Codes, Construed Sec. 3 as Being One of the Anti-Trust Laws for Which a Remedy Is Given in the Clayton Act.

Editions of the U. S. Code are prepared and published under the supervision of the Committee on Judiciary of the House of Representatives (1 U. S. C. Sec. 202; 45 Stat.

1007, 45 Stat. 1541). That the Judiciary Committee has construed Sec. 3 as being one of the anti-trust laws for which a remedy is given in the Clayton Act is clear. It is equally clear that the Judiciary Committee has furnished us with an administrative construction:

By giving Sec. 3 the code section number 13-A in the 1940 and subsequent codes, the Committee therefore included it in the codification of Sec. 1 of the Clayton Act (15 U. S. C. 12) in which the anti-trust laws are stated to include Secs. 1-27. Since Sec. 4 of the Clayton Act (15 U. S. C. 15) gives an injured party a cause of action by reason of anything forbidden by the "anti-trust laws", the committee must have considered that Sec. 3 of the Robinson-Patman Act is one of the anti-trust laws for which there is a remedy under the Clayton Act.

An established administrative interpretation of a statute should not be overruled except for weighty reasons. (*Commissioner of Internal Revenue* v. *Sternberger*, 348 U. S. 187-199, 1955.) Despite the passage of seventeen years since the committee placed the interpretation upon Sec. 3 to which we have referred, Congress has not disagreed. The failure of Congress to alter or amend an act notwithstanding a consistent construction by the Department charged with its enforcement creates a presumption in favor of the administrative interpretation to which great weight should be given. (*Costanza* v. *Tillinghart*, 287 U. S. 341-345, 1932.)

IV.

In Two Previous Cases Where the Issue Was Not Raised, This Court Has Adopted a Construction of Sec. 3 Giving a Party a Cause of Action for Damages on Account of a Violation of Sec. 3.

In *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 1947, the court stated (p. 774) that the question involved was whether renewal notes given for the sale of goods are uncollectible if the vendor violated the "Robinson-Patman Act (June 19, 1936) 49 Stat. 1526, 1528, C592, 15 U. S. C. A. Secs. 13, 13-A." At p. 750 the court said, "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, C592, 15 U. S. C. A. Sec. 13a, 4 F. C. A. title 15, Sec. 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. (October 15, 1914) 38 Stat. 730, 731, C323, 15 U. S. C. A. Sec. 15, 4 F. C. A. title 15, Sec. 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

In the case of *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, 1955, the opening paragraph of the opinion states that, "This is a suit for treble damages, 38 Stat. 731, 15 U. S. C. Sec. 15, brought for violations of Sec. 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. Sec. 13(a), and of Sec. 3 of the Robinson-Patman Act, 15 U. S. C. Sec. 13(a)."

The plaintiff had been given a judgment in the District Court. The Court of Appeals reversed upon the

grounds that local transactions only were involved. This court reversed the Court of Appeals and affirmed the District Court, holding that "the practices in the present case are within the scope of the anti-trust laws." Nothing was said in the opinion as to whether a cause of action would lie for damages under Sec. 3, but the court must have considered the question in the affirmative. Otherwise the court would not have sustained the judgment of the District Court.

It is true that in both of the cases just cited the issue was not raised as to whether a party injured by a violation of Sec. 3 has a remedy for damages under the Clayton Act. However, the fact remains that despite the construction placed upon Sec. 3 in the *Bruce's Juices* case in 1947 and in the *Moore* case in 1955, Congress has enacted no legislation to the contrary. Where the Supreme Court places a construction upon an act and Congress does not then amend it, it must be taken as clear that Congress approves the construction. (*Baltimore and Ohio Railroad Company* v. *Baugh*, 149 U. S. 368-372, 1892; *U. S.* v. *Elgin, Joliet and Eastern Railway Co.*, 298 U. S. 492-500, 1936.)

It is also worthy of consideration that the District Courts have generally sustained suits for treble damages under Sec. 3 of the Robinson-Patman Act. (*Atlanta Brick Co.* v. *O'Neal*, 44 F. Supp. 39, D. C. E. D. Tex., 1942; *A. J. Goodman and Son* v. *United Lacquer Mfg. Corp.*, 81 F. Supp. 890, D. C. Mass., 1949; *Spencer* v. *Sun Oil Co.*, 94 F. Supp. 408, D. C. Conn., 1950; *Balian Ice Cream Co.* v. *Arden Farms*, 94 F. Supp. 796, S. D. Calif., 1950; *Myers* v. *Shell Oil Co.*, 96 F. Supp. 670, D. C. S. D. Calif., 1951; Supp. 603, D. C. N. D. Calif., 1954; *Waldes Kohinoor, Inc.* v. *Stabile*, 140 F. Supp. 916, S. D. N. Y., 1956.)

CONCLUSION.

Petitioner submits that Sec. 3 of the Robinson-Patman Act is one of the anti-trust laws as defined by Sec. 2 of the Clayton Act and that it is therefore entitled to maintain a suit for damages and injunction under the provisions of Sec. 4 of the Clayton Act. For the foregoing reasons the judgment of the Court of Appeals, Seventh Circuit, should be reversed.

Respectfully submitted,

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APPENDIX I.

The Robinson-Patman Act.

49 Stat. 1526.
[Public—No. 692—74th Congress.]
[H.R. 8442.]

AN ACT.

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

"Sec. 2 (a) That *it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing here-

in contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as

provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

APPENDIX II.

History of Robinson-Patman Act.

H. R. 8442 was introduced in the 74th Congress by Representative Patman and referred to the Committee on Judiciary June 11, 1935 (79 Cong. Rec. 9081) S. 3154 was introduced in the same Congress by Senator Robinson and referred to the Committee on Judiciary June 26, 1935. (79 Cong. Rec. 10129.) The two bills when introduced were identical. (See remarks by Senator Robinson, 80 Cong. Rec. 6278.) Senator Borah and Senator Van Nuys introduced S. 4171 at the same Congress on March 4, 1936. (80 Cong. Rec. 3204.)

Senator Logan reported S. 3154 favorably from the Committee on Judiciary with an amendment on February 3, 1936. (80 Cong. 1333.) He stated that he was Chairman of the Sub-Committee to which the bill had been referred and had been directed by the Committee on Judiciary to report the bill (80 Cong. Rec. 3119) and that the bill was the Robinson bill with amendments. (80 Cong. Rec. 3119.) After the Committee report of the bill by Senator Logan, Senator Borah stated that he would offer the adoption of the Borah-Van Nuys bill as an amendment to the Robinson bill. (80 Cong. 6276.) Later the Senate proceeded to consider S. 3154 on Senator Robinson's motion. (80 Cong. Rec. 6279.) Senator Logan asked unanimous consent that the committee amendment be first considered. (80 Cong. Rec. 6279.) The Presiding Officer stated "Without objection it is so ordered. The Clerk will read the amendment in the nature of a substitute." (80 Cong. Rec. 6279.) The clerk read the full text. (80 Cong. Rec. 6279.) After the Clerk concluded reading the Com-

mittee amendment the Presiding Officer ruled that "Any amendment to be offered should be offered before the pending amendment is agreed to, because it is an amendment in the nature of a substitute." (80 Cong. Rec. 6280.) Thereafter, Senator Borah offered his amendment. He was asked by Senator Logan, "How the Senator's amendment should be included in the Robinson Bill." He replied, "I will offer it as a new section." Senator Borah's amendment was agreed to as an amendment to the committee amendment. (80 Cong. Rec. 6351.) Thereafter on April 30, 1936 the bill was ordered engrossed for a third reading, read for a third time and passed. (80 Cong. Rec. 6436.)

H. R. 8422 was passed by the House (80 Cong. Rec. 8442) after having adopted a committee amendment (80 Cong. Rec. 8241) and was sent to the Senate. (80 Cong. Rec. 8279.) On May 30, 1936, Senator Robinson stated in the Senate that the House, instead of acting on the Senate bill which had been sent to it, had passed its own bill without notice of the Senate bill. (80 Cong. Rec. 8403.) He then stated that it was his purpose to ask the Senate to strike out all of the House bill after the enacting clause and to insert in lieu thereof the original Senate bill so that the whole subject might be in conference. (80 Cong. Rec. 8403.) He offered the amendment. (80 Cong. Rec. 8418.) It was agreed to (80 Cong. Rec. 8419) and the bill was read a third time and passed as so amended. (80 Cong. Rec. 8419.) Senator Robinson then moved that the Senate insist on its amendment, ask for a conference and that the Chair appoint conferees on the part of the Senate. (80 Cong. Rec. 8419.) The motion was agreed to and the Vice-president appointed Senators Logan, Van Nuys, McGill, Borah and Austin as conferees. (80 Cong. Rec. 8419.) The House agreed to the conference and the Chair appointed Representatives Utterback, Miller, Celler, McLaughlin, Summers, Guyer and Robinson as conferees. (80 Cong. Rec. 8617.)

The Conference Committee report was submitted to the House and agreed upon. (80 Cong. Rec. 9422.) Likewise in the Senate the Conference Committee report was submitted and agreed upon. (80 Cong. Rec. 9202.)

APPENDIX III.

(All emphasis supplied.)

A.

Remarks in the Senate Upon the Offering of the Borah-Van Nuys Amendment to S. 3154.

Senator Borah said (80 Congressional Record 6346): "Mr. President, *the amendment is designed to cover certain specific matters which we think ought to be inhibited as a matter of law, certain things which we think ought to be prohibited without the intervention of the discretionary power of the Federal Trade Commission or other bureau.* The matters which we propose to prohibit that of allowing discount or rebate or allowance for advertising service charge to one purchaser without making it available to each and every other purchaser. *That, it seems to us, should be prohibited as a matter of law, and that there need not be any discretion laid anywhere with reference to the execution of that kind of law. That is the distinction really between the bill which is now pending and the proposed amendment.*

It is not our purpose to embarrass or impede the action upon the main measure, but we shall ask that it be adopted as an amendment, believing that the two propositions can be reconciled when the bill goes to conference, and that we can save the principles of both."

Further on (p. 6348), the following appears:

> "Mr. Logan. I agree with the Senator; but under the Robinson bill the merchant may bring suit in the courts to recover damages. However, the only question that arises in my mind just now is as to how the

Senator's amendment should be included in the Robinson bill.

Mr. Borah. *I will offer it as a new section.*

Mr. Logan. That would be satisfactory to me, I am quite sure.

Mr. King. Mr. President, will the Senator yield?

Mr. Borah. Just a moment. I was about to say that from what we know of the situation in the House they will probably offer their bill as a substitute for this measure.

The bill of the Senator from Arkansas (Mr. Robinson), the bill offered by the Senator from Indiana (Mr. Van Nuys) and myself, and the House measure will be in conference, and from those measures I should think some satisfactory law ought to be worked out.

Mr. Logan. I think that is true, Mr. President; and if I understand it, the entire bill, if that should happen, could be rewritten by the conferees, and such amendments as might be deemed necessary could be added by the conferees if the House should substitute its own bill. Then the whole thing would be open, as I understand.

Mr. Borah. Yes.

Mr. King. Mr. President, will the Senator from Idaho permit an interruption?

Mr. Borah. I yield.

Mr. King. Does the Senator perceive any incongruity between the bill which he has offered—and I refer particularly to the penal provision—and the so-called Robinson bill, where the remedy is by suit for damages, based upon whatever damages may be sustained by reason of so-called discrimination?

Mr. Borah. *My view is that there are certain practices so obviously improper and unjust that they ought to be prohibited by specific provision of law, and that indulging in them ought to constitute a crime.* There are things like the granting of quantity discounts which are difficult to cover by a specific provision of law and make the violation punishable, but when we come to the special discount allowance, or rebate allowance, or service-charge allowance, or advertising allowance,

to one party and the refusal of it to another, that is a fraudulent transaction.

Mr. King. It seems to me that the Clayton Act, particularly section 2, and the Sherman anti-trust law, pretty effectively deal with the evils of which the Senator complains and which this proposed bill seeks to prevent.

Mr. Borah. In a sense, that is correct, but when the businessman knows positively that if he does a thing he will be subject to criminal prosecution, that is a great deterrent. And it is not a thing about which he might be honestly misled. If he makes these allowances to one and refuses them to another, if he makes rebates to one and refuses them to another, it is a matter wholly within his knowledge, and done after full consideration and full knowledge of what he is doing.

Mr. Logan. *Mr. President, may I interrupt the Senator to ask whether it is unusual to provide, for violation of a statute, a criminal prosecution and also a right to sue for damages? The two are not inconsistent.*

Mr. Borah. *No; we have such a provision in the Sherman antitrust law.*

Mr. Logan. *That is what I thought.*"

B.

Remarks in the House Upon the Consideration of the Conference Committee Report:

The full context of the Conference Committee report is given in the Congressional Record when the report was called up for consideration in the House by Rep. Utterback. (80 Cong. Rec. 9413-9415.) This is followed by a discussion of the report by Rep. Utterback. (80 Cong. Rec. 9415-9419.) There immediately follows a discussion by Rep. Celler who was a member of the Conference Committee

but did not sign the report because he did not agree to it. (80 Cong. Rec. 9419.)

> "Mr. Speaker, I shall not consume the 5 minutes. *I simply want to get the record clear*, because, of course, *in endeavoring to interpret properly the language of statutes, the courts must, perforce, look to the statements that appear in the record on debate.*
>
> Bills ofttimes are vague and ambiguous. *To clear* up much of uncertainty, or rather to point it out, it is my purpose in arising."

Rep. Celler discussed some of the features of the bill (p. 9419). He then yielded for questions by other members of the House. The following are the pertinent parts of the discussion that ensued (p. 9420):

> "Mr. Boileau. I understand the Borah-Van Nuys is a separate and distinct section from the House provision and some of the conferees on the part of the House have stated to me that there is no inconsistency and that the House provisions prevail, but that the Borah-Van Nuys amendment is simply an additional remedy.
>
> Mr. Celler. I ask the gentleman to read section 3, the Borah-Van Nuys provision, and then read section 2 and section 1 and see whether that is so.
>
> *Also let me point out that this bill is an amendment to the Clayton Act, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of the discrimination. In addition for the same act of discrimination, to the triple damages* the business man can by section 3 of this bill, be hailed to court and fined $5,000 or imprisoned for 1 year. I ask you to think carefully before you accept such a bill with such penalties. * * * Mr. Hancock of New York. If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?
>
> Mr. Celler. If he violates the Borah-Van Nuys pro-

vision of the bill he is subject to penalties of a criminal nature and has committed an offense.

Mr. Hancock of New York. *Would he also be liable for triple damages?*

Mr. Celler. *And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.*"

At the conclusion of Rep. Celler's remarks, Rep. Miller, a member of the Conference Committee took over the discussion. He explained (p. 9421) that when the House bill reached the Senate the latter struck out all after the enacting clause and substituted its own bill; that the bill then went to Conference Committee and that the bill reported by the Conference Committee "is substantially the House bill, rearranged, including the Borah-Van Nuys amendment which is section 3 of the bill.". The following are the pertinent parts of the discussion (p. 9421) that then appear:

"Mr. Miller.' Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here amends section 2 of the Clayton Act. That is the House bill substantially and when I say to you it is substantially the House bill, every amendment that was offered in the Senate was receded from by the Senate. * * *

Mr. Massingale. Does the bill agreed to by the conferees carry the penalty of triple damages and also a penalty under the criminal law?

Mr. Miller. The penalty of triple damages is the old law. In other words we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of this bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the

provisions of Section 2 of the Clayton Act as amended. Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and I believe that is a reasonable construction, if you will look at the bill.

Mr. Massingale. There is no criminal offense involved for anything outside of what is contained in that section?

Mr. Miller. In Section 3.

Mr. Hancock of New York. *Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject to triple damages to any one who claims to be aggrieved?*

Mr. Miller. *That is true*, but the criminal part is included in section 3 and section 3 only.

Mr. Hancock of New York. *But is it a part of the same act?*

Mr. Miller. *Of course it is*, but it is not a part of the Clayton Act as amended by section 2. It ought to be as far as that is concerned, if a seller willfully discriminates. * * *

* * * * *

Mr. Celler. It is possible, of course, for a man to violate section 3 and by the same act be guilty of violation of the other sections of the bill?

Mr. Miller. That would be entirely possible.

Mr. Celler. *So that he would be subject to triple damages as well as criminal prosecution.*

Mr. Miller. *That would be entirely possible.*

* * * * *

Mr. Miller. Mr. Speaker, *I want to say that Congress really wants a bill amending the Clayton Act* and desires to retain the three objectives of the House bill, the conferees on the part of the House, excluding myself, did a good job and brought back to the House a bill which thoroughly represents, in their opinion, and in my opinion, the expressed will of the House as indicated by the passage of the Patman bill."

C.

Remarks in the Senate Upon Consideration of Conference Committee Report.

When the Conference Committee report was being considered in the Senate, the following colloquy occurred between Senator Vandenberg and Senator Van Nuys who had been one of the conferees (80 Cong. Rec. 9903):

"Mr. Vandenberg: Mr. President, I should like to ask the Senator from Indiana one or two questions about the conference report.

The fact has been called to my attention that section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same.

Mr. Van Nuys: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law. If a prima facie case is made against an alleged unfair practice, the respondent may rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law."

APPENDIX IV.

The Borah-Van Nuys Amendment.

The Borah-Van Nuys amendment, which was offered by Senator Borah as Sec. 2 of the bill (80 Cong. Rec. 6346) reads as follows (80 Cong. Rec. 6349):

Sec. 2. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminate to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Nothing in this section shall prevent a cooperative association from returning to producers or consumers, or a cooperative wholesale association from returning to its constituent retail members, the whole, or any part of, the net surplus resulting from its trading operations in proportion to purchases from, or sales to, the association.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 1 year, or both.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

REPLY BRIEF OF NASHVILLE MILK COMPANY, PETITIONER.

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IN THE

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OCTOBER TERM, 1957.

No. 67

NASHVILLE MILK COMPANY,

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PETITIONER'S REPLY BRIEF.

Respondent's brief is silent as to the primary supporting arguments advanced in our brief. We argued that it is clear from the Robinson-Patman Act that the act in its entirety amended the Clayton Act (Br. 15-19). In support of that argument, we pointed out that Sec. 2 of the Robinson-Patman Act used the term "this amendatory act" four times when referring to that act, thus characterizing the *entire act* as being amendatory in nature (Br. 16). We pointed out further evidence in support of our argument is to be found in the fact that Secs. 2 and 4 are not contained in quotation marks as is Sec. 1, yet those sections clearly became a part of the Clayton Act by amendment (Br. 16). This evidence clearly shows that Congress intended all sections of the Robinson-Patman Act to amend the Clayton Act. Respondent has not uttered a syllable in its brief in reply to these two supporting arguments.

I.

Reply to Division I.

Whether Sec. 3 of the Robinson-Patman Act amended and became a part of the Clayton Act is to be determined by the intention of Congress. This intention may be determined from the internal evidence furnished by the act itself and also the external evidence consisting of its history in Congress. We argued fully in our brief that both the internal and external evidence establish that Congress intended that Sec. 3 should become a part of the Clayton Act.

Respondent's reference in its brief to other anti-trust laws that did not pretend to amend the Clayton Act or that did not give a civil suit for treble damages because of their violation is therefore irrelevant. The issue is what Congress intended here.

Respondent states that a bill was introduced in the 84th Congress (S. 3516) to amend Sec. 1 of the Clayton Act to include Sec. 3 of the Robinson-Patman Act as one of the anti-trust laws but it failed to pass. The bill was introduced by Senator Humphrey. In explaining the bill, Senator Humphrey stated its purpose was to provide that officers and directors of a corporation authorizing acts "which constitute criminal violations of the anti-trust laws" should be liable to forfeit to the United States in an amount twice their compensation covering the period when such violations occurred. The forfeiture was to be recovered in a civil action brought by the United States (102 Cong. Rec. 5404). Manifestly the introduction of such a bill is irrelevant to the issue here.

II.

Reply to Division II-A.

Respondent states that the *Vance* case (*Vance v. Safeway Stores, Inc.*, 239 F(2) 144) held that all four sections of the Robinson-Patman Act comprise the text of an amendment to "Section 2 of the Clayton Act". We do not so read that case. It did not single out Sec. 2 of the Clayton Act and hold that Secs. 2, 3 and 4 of the Robinson-Patman Act became a part of that section of the Clayton Act by amendment. Neither do we take such a position.

What the *Vance* case did hold, as reasonably interpreted, and what we contend, is that Sec. 1 of the Robinson-Patman Act amended Sec. 2 of the Clayton Act; and that Secs. 2, 3 and 4 of the Robinson-Patman Act comprise additional matter added to the Clayton Act by way of amendment. Nothing said by us in our brief repudiates or is in any way inconsistent with the opinion of the Court of Appeals in the *Vance* case.

Respondent asks if we "suggest" that Secs. 2, 3 and 4 were intended to be added to the Clayton Act. Evidently respondent did not fully comprehend our argument. We not only "suggested" but we argued fully in our brief (pp. 16-19) that all sections of the Robinson-Patman Act amended and became a part of the Clayton Act; and that "all" sections of the Robinson-Patman Act are integrated and inter-related parts of the whole".

Respondent shows a strange silence as to our argument that although quotation marks did not appear enclosing Secs. 2 and 4 of the Robinson-Patman Act, the former (dealing with pending actions) and the latter (exempting co-operatives) clearly amended the Clayton Act. If the absence of quotation marks from those sections would not exclude them as amendatory of the Clayton Act, the absence

of quotation marks from Sec. 3 would therefore not exclude it as amendatory of the Clayton Act. Respondent does not make even the pretense of an answer to that argument.

Respondent states that when Congress adds to an existing act it says so by expressly referring to the inserting of new matter. In support of this it refers to the manner in which the Clayton Act was amended in 1955. But respondent does not deny that there may be, as here, an implied amendment. It does not follow that because in 1955 Congress made an express amendment to the Clayton Act by the addition of two new sections, Congress has set an irrevocable patter as to how the Clayton Act is to be amended. Neither does it exclude the power or intention of Congress to have ever added sections to the Clayton Act by implication.

Respondent does not deny that the first two clauses of Sec. 3, dealing with discriminatory prices, are akin to Sec. 2 of the Clayton Act. But respondent states that the third clause is "more closely related" to the Sherman Act. From this respondent seems to imply that it cannot be said whether Sec. 3 amends the Clayton Act or the Sherman Act. Whatever may be the validity of respondent's position that the third clause is more closely related to the Sherman Act, respondent's implication would only be good if Sec. 3 had been adopted by Congress in a bill of its own independent of Secs. 1, 2 and 4. Here it is adopted in a bill with three other sections all of which we have shown are inter-related; three of which without doubt amend the Clayton Act; and one of which characterizes the act four times as "this amendatory act".

Respondent argues that Sec. 3 is a separate enactment of its own having nothing to do with the Clayton Act because of the criminal prevision for its violation. The purpose of the criminal provision is shown in the remarks of Senator

Borah, one of the sponsors of the Borah-Van Nuys amendment. His remarks are reproduced in Appendix III of our brief, pp. 34-35. He stated that "My view is that there are certain practices so obviously improper and unjust that they ought to be prohibited by specific provision of law, and that indulging in them ought to constitute a crime". Shortly after that statement the following colloquy occurred:

> Mr. Logan. Mr. President, may I interrupt the Senator to ask whether it is unusual to provide for violation of a statute, a criminal prosecution and also a right to sue for damages? The two are not inconsistent.
>
> Mr. Borah: No; we have such a provision in the Sherman anti-trust law.

It is perfectly obvious that merely because Congress chose to make a violation of Sec. 3 alone subject to criminal penalties without annexing criminal penalties for the violation of other sections of the Clayton Act, it would not necessarily follow that the presence of the criminal provision in Sec. 3 would negate that it became part of the Clayton Act, especially where it is otherwise as here clear that Congress intended that Sec. 3 should become a part of the Clayton Act.

Reply to II-B.

At p. 20 of its brief respondent has drawn out of context a remark of Representative Miller, one of the House Conferees. The discussion that led up to the remark is reproduced in full in Appendix B of our brief at pp. 37-38. Representative Miller explained that Sec. 3 "is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of this bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of Sec. 2 of the Clayton

Act as amended. Sec. 3 of the bill is placed in an effort to make the criminal offense apply to that particular section, and I believe that is a reasonable construction if you will look at the bill". After a question by Representative Massingale, the following appears:

> Mr. Hancock of New York: Is it not perfectly clear that any vendor who discriminates in price between purchasers *is guilty of a crime and is also subject to triple damages to anyone who claims to be aggrieved?* (Italics added.)
>
> Mr. Miller: *That is true,* but the criminal part is included in section 3 and section 3 only. (Italics added.)
>
> Mr. Hancock of New York: *But it is part of the same act?* (Italics added.)
>
> Mr. Miller: *Of course it is,* but it is not part of the Clayton Act as amended by section 2. (Italics added.)

It is the last remark that respondent has quoted in its brief out of context. It is clear when considered in context that Representative Miller intended to convey the thought that the criminal provision of Sec. 3 was limited to that section alone and *did not otherwise extend into that part of the Clayton Act which was amended by Section 2.* To conclude that he intended to convey the thought that only Sec. 2 amended the Clayton Act would distort the plain meaning of his remarks.

Respondent calls attention to the fact that the Borah-Van Nuys amendment was included as a sub-section in the House bill after its Senate amendment; but that it became a separate section (3) in the bill as re-written by the Conference Committee. This does not have the significance respondent has given to it. Representative Miller's statement, just quoted, that "Section 3 of the bill is placed in an effort to make the criminal offense apply to that section" clearly shows the purpose of having the contents of Sec. 3 so placed in a separate section of the bill. It

was to make it clear that the criminal penalties for its violation would apply to that section alone and not to any other part of the bill.

Another consideration removes the significance to which respondent attaches to the content of Section 3 so appearing detached from Sec. 1 of the bill. What is Sec. 4 (the co-operative provision) had been in the section containing the Borah-Van Nuys amendment that passed the Senate. The Conferees detached it from the Borah-Van Nuys amendment of the Senate bill and, with a slight amendment, incorporated it as Sec. 4 of the bill (See Conference Committee Report, 80 Cong. Rec. 9415). We argued in our brief, without challenge from respondent's brief, that Sec. 4 amended and became part of the Clayton Act. It could hardly be concluded that the detachment of what became Sec. 4 from the Borah-Van Nuys amendment establishes that the Conferees did not intend Sec. 4 to amend and become a part of the Clayton Act any more than a similar conclusion as to Sec. 3 because of its detachment.

Respondent contends (Br. 19-20) that the language of the Conference Committee report excludes Sec. 3 as an amendment of the Clayton Act. This contention was relied upon by the Court of Appeals and was fully argued to the contrary in our brief (pp. 14-15). Respondent has made no answer to our argument.

At p. 21 of its brief respondent quotes a portion of Representative Celler's remarks but significantly failed to quote the following remarks appearing on the preceding page of the Congressional Record (p. 9420) which are set forth in Appendix B of our brief (pp. 36-37):

> Mr. Celler: If he violates the Borah-Van Nuys provision of the bill he is subject to penalties of a criminal nature and has committed an offense.

Mr. Hancock of New York: *And would he also be liable for triple damages?* (Italics supplied.)

Mr. Celler: *And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.* (Italics supplied.)

It is also significant that respondent has no comment to make about other remarks by Representative Celler and by Representative Miller set forth in Appendix B of our brief (p. 39) which plainly show that those two members of the Conference Committee considered that they had participated in the preparation of a bill under which a civil suit for damages would accrue to a party injured by a violation of Sec. 3.

Conclusion.

The balance of respondent's brief has been already covered in our brief and we consider no reply is required.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1957.

No. 67

NASHVILLE MILK COMPANY,

Petitioner,

vs.

CARNATION COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

STATUTES INVOLVED.

In addition to Section 3 of the Robinson-Patman Act, quoted in petitioner's brief (p. 2), and the entire Act (Pet. Br. 25)[1] the following statutes are involved. The pertinent parts thereof are as follows:

Clayton Act, Section 1, 38 Stat. 730 (1st paragraph):

> "Antitrust laws" as used herein includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July second, eighteen hundred ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", of August twenty-seventh, eighteen hundred and

1. The text of the Robinson-Patman Act as printed in Petitioner's Brief is in error in that none of the text following the words "is amended to read as follows:" in Section 1 is indented.

ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

Clayton Act, Section 4, 38 Stat. 731, Title 15 U. S. C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold, the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Clayton Act, Section 16, 38 Stat. 737, 15 U. S. C. §26:

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws *. * *

R. S. §7, 1 U. S. C. (1934 ed.) §21 (now 1 U. S. C. §301):

The enacting clause of all Acts of Congress shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."

R. S. §9, 1 U. S. C. (1934 ed.) §23 (now 1 U. S. C. §103):

No enacting or resolving words shall be used in any section of an Act or resolution of Congress except in the first.

R. S. §10, 1 U. S. C. (1934 ed.) §24 (now 1 U. S. C. §104):

Each section shall be numbered, and shall contain as nearly as may be, a single proposition of enactment.

Section 1, 61 Stat. 633, 1 U. S. C. §204(a):

In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of

Columbia, and of each State, Territory, or insular possession of the United States—

(a) United States Code.—The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

STATEMENT OF THE CASE.

Petitioner's summary of the proceedings in the courts below (Br. 3) does not make clear what occurred there. In essence, Respondent sought dismissal in the District Court upon three grounds (R. 10-11); (1) that no private remedy lies for a violation of Section 3 of the Robinson-Patman Act (the question before this Court); (2) that petitioner could not sue for a violation of the Robinson-Patman Act in view of the Congressional policy relative to filled milk stated in the Filled Milk Act, 42 Stat. 1486, 21 U. S. C. §§61-63; and (3) that Petitioner did not allege that Respondent sold or contracted to sell filled milk in interstate commerce, and therefore did not allege a violation of Section 3 of the Robinson-Patman Act. The District Court sustained Respondent's motion to dismiss on the second of the three grounds, expressly overruling the other two grounds (R. 11). On appeal, Respondent urged the correctness of the District Court's decision upon each of the three grounds. The Court of Appeals, convinced of the merits of the first ground, expressly declined to consider the other two (R. 14).

Also, Petitioner incorrectly states (Br. 4) that the complaint alleges Respondent and its subsidiaries "own and operate 30 factories in more than 20 states for the processing of filled milk." The allegation in question relates to factories for the processing of "milk", not "filled milk" (R. 4).

SUMMARY OF ARGUMENT.

Petitioner's right to the private remedies afforded by the Clayton Act, for a claimed violation of Section 3 of the Robinson-Patman Act, depends upon whether Congress impliedly made Section 3 an "antitrust law" as defined by the Clayton Act. The presumption is against amendments by implication. In the final analysis the intent of Congress must control.

I.

The continued intent and policy of Congress has been to limit the antitrust laws for violation of which private suits may be brought to those antitrust laws designated in Section 1 of the Clayton Act. For reasons indicated by the Court of Appeals (R. 15, 16), reference must be made to the original text of Section 1 of the Clayton Act which defines "antitrust laws" to be the Sherman Act, certain sections of the Wilson Tariff Act, and the Clayton Act. Congressional refusal to include the Federal Trade Commission Act within this definition, or to provide treble damages for its violation, and Congressional failure to enlarge the definition of "antitrust laws" in Section 1 despite the passage of additional antitrust laws, demonstrates the continued intent and policy of Congress that this definition exclude all other antitrust laws.

II.

A. The text of the Robinson-Patman Act, including its title, its enacting clause, its division into four sections, and particularly its use of quotation marks, shows Congress intended that Section 3 was not to become part of the Clayton Act. The *Vance* case held the entire Robinson-Patman Act to be an amendment of Section 2 of the Clayton Act. This decision is erroneous because it attached no significance to the title of the Act or to the use of quotation marks and because it construed the enacting clause contrary to the provisions of R.S. §§7 and 9. There is no merit to Petitioner's argument that Section 3 amends the Clayton Act generally because it deals with the same subject matter. When Congress wishes to add a new section to an existing act, it does so expressly. Moreover, the third clause of Section 3, invoked here, deals with a different subject matter than the Clayton Act. Nor is there merit to Petitioner's argument that one statute amends another where the latter adds to or subtracts from or changes the scope or effect of the earlier, for Section 3 in no way adds to or subtracts from the Clayton Act or changes its scope or effect. The repeal of Section 3 would not affect the Clayton Act in any manner whatsoever.

B. The legislative history of Section 3 also shows Congress did not intend Section 3 to be an amendment of the Clayton Act. Section 3 originated in the Senate as subsection (h) of a proposed amendment of Section 2 of the Clayton Act and went to a conference committee of both houses as such an amendment. The Conference Committee compromised the bills passed by the House and Senate by deleting the Section 3 language as an amendment of Section 2 of the Clayton Act and adding it as a separate Section 3 of the bill, thus affirmatively demonstrating an intent that Section 3 was not to become part of the Clayton

Act. The report of the House members of the Conference Committee and the debates on the Conference bill also show that Congress did not intend Section 3 to become part of the Clayton Act. The debates relied upon by Petitioner as showing the contrary indicate merely that when an act is committed in violation of the overlapping provisions of Section 3 and the amendment of Section 2 of the Clayton Act provided for by Section 1 of the bill, the violator can not only be proceeded against criminally under Section 3, but is also subject to treble damages by reason of his violation of the amended Section 2 of the Clayton Act.

C. There is no merit to Petitioner's contention that the action and nonaction of the House Judiciary Committee in codifying Section 3 is an administrative interpretation; and Petitioner's contention is directly contrary to 61 Stat. 633, 1 U. S. C. §204(a) and *Stephan* v. *United States*, 319 U. S. 423, holding provisions of the Code cannot stand when they are inconsistent with the Statutes at Large.

III.

The decision of the Court below states the sounder view of the decided authorities. The leading authority supporting Petitioner's position, other than *Vance*, is *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796. Its conclusions are unsatisfactory, however, because they are based on the erroneous premises that the Sherman Act, the Wilson Tariff Act, and the Clayton Act were *all* of the antitrust laws in existence when the Robinson-Patman Act was enacted and that there has been a Congressional policy to use treble damage actions to enforce all antitrust laws. Further, the Court apparently was not fully informed concerning the legislative history of the Act and none of the authorities cited by it involved the specific issue presented

here. The decisions of this Court in *Bruce's Juices* v. *American Can. Co.*, 330 U. S. 743 and *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, contain dicta upon which Petitioner relies. However, these decisions are soundly based upon Section 2 of the Clayton Act and the dicta have, therefore, no weight. Petitioner's argument that the dicta should be treated as if they were the considered opinion of this Court in the face of which Congress had taken no action is without merit.

ARGUMENT.

Petitioner's right to the remedies provided by Section 4 and 16 of the Clayton Act (38 Stat. 731, 737, 15 U. S. C. §§ 15, 26), for an alleged violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528), depends upon "whether Section 3 of the Robinson-Patman Act became one of the 'antitrust laws' as defined by Section 1 of the Clayton Act" (Pet. Br. 9).

Congress did not expressly make Section 3 of the Robinson-Patman Act one of these "antitrust laws." Petitioner argues that Congress did so by implication. But the presumptions are against Petitioner on this score; amendments by implication are not favored. Sutherland, *Statutory Construction*, 3d Ed., §§ 1913, 1930. As is there said (§ 1930):

> "* * * As to changing statutory law, there is a presumption against the implied * * * amendment of any existing statutory provision. In accord with this conservative attitude, an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied."

This rule applies with especial force here, where the result of the implied amendment would be the creation of additional private rights to sue for treble damages for violation of the "antitrust laws". *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174-175. As was said by this Court in the *Wilder* decision (pp. 174-175 of 236 U. S.):

> "* * * where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes."

In the final analysis, of course, whether Section 3 of the Robinson-Patman Act became one of the "antitrust laws"

as designated in Section 1 of the Clayton Act must be determined by ascertaining the intent of Congress. *U. S. v. Amer. Trucking Ass'ns*, 310 U. S. 534, 542; *O'Prey v. United States*, 249 U. S. 323. See also *First State Bank of Shelby v. Bottineau*, 56 Mont. 363, 185 Pac. 162-164, relied upon by Petitioner (Br. 18-19).

I.

IT HAS BEEN THE INTENT AND POLICY OF CONGRESS TO LIMIT THE ANTITRUST LAWS FOR VIOLATION OF WHICH PRIVATE SUITS MAY BE BROUGHT TO THE ANTITRUST LAWS EXPRESSLY ENUMERATED IN SECTION 1 OF THE CLAYTON ACT.

With respect to Section 1 of the Clayton Act, reference must be made to the original text (38 Stat. 730, quoted *supra*) instead of its codification in 15 U. S. C. § 12 for the reasons set forth in the opinion of the Court below (R. 15-16) and at pages 14-16 of the petitioner's brief in *Safeway Stores, Inc. v. Vance* (No. 69 at the Oct. 1957 term of this Court). Section 1 of the Clayton Act (38 Stat. 730), which has never been amended, specifies that "antitrust laws" as used throughout the Clayton Act includes the Sherman Act, certain sections of the Wilson Tariff Act, as amended, and the Clayton Act itself.[2]

It is Respondent's position that it was and has been the intent and policy of Congress to limit this term "antitrust laws" for all purposes of the Clayton Act to these statutes and to subsequent enactments constituting parts of one or more of them.

The express enumeration of these statutes implies the

2. Many statutes other than these three are often referred to as "antitrust laws". There are 71 acts so designated in the compilation, "Antitrust Laws with Amendments 1890-1951", compiled by Elmer A. Lewis, Superintendent Document Room, House of Representatives, and printed by the Government Printing Office 1955.

exclusion of all other anti-trust laws—*inclusio unius est exclusio alterius*.[3] If Congress had intended to include other antitrust laws it would either have said so or would have used the term "antitrust laws" in the Clayton Act without defining it. The mere fact that the term is defined demonstrates the intention of Congress to limit the phrase to the three named antitrust laws.[4]

Other facts also demonstrate this intent of Congress. The Federal Trade Commission Act (38 Stat. 717), another antitrust law, was pending in Congress at the same time as the Clayton Act. Before the passage of either, Senator Reed called the Senate's attention to the fact that the Federal Trade Commission Act was not included as an "antitrust law" in Section 1 of the Clayton bill (51 Cong. Rec. 13117-13118). Thereafter an amendment of the Federal Trade Commission bill was offered in the Senate to permit treble-damage suits to be maintained for injuries resulting from violations of that Act (51 Cong. Rec. 13143) but the amendment failed to pass (51 Cong. Rec. 13150). Congress plainly understood and intended, therefore, that the definition of "antitrust laws" in Section 1 of the Clayton Act was exclusive and limited the application of Sections 4 and 16 of the Clayton Act to violations of the Sherman Act, certain sections of the Wilson Tariff Act and the Clayton Act.

If this were not true, private injunction and treble-damage suits could be maintained not only for violations of the Federal Trade Commission Act, but also for violations of Section 15 of the Shipping Act of 1916 making certain agreements unlawful unless approved by the Shipping Board (39 Stat. 733, 46 U. S. C. § 814), Section 202 of the

3. The naming of only five of the 77 sections of the Wilson Tariff Act as "antitrust laws" also indicates the exclusionary purpose of the statute.

4. See the discussion of this point at pp. 12-13 of the petitioner's brief in *Safeway Stores, Inc.* v. *Vance* (No. 69 at the Oct. 1957 term of this Court).

Packers and Stockyards Act prohibiting certain acts, agreements and conspiracies relating to prices and safes territories (46 Stat. 161, 7 U. S. C. § 192), Section 337 of the Tariff Act of 1930 prohibiting unfair methods of competition and unfair acts in the importation of articles into the United States (46 Stat. 703, 19 U. S. C. § 1337), Section 408 of the Civil Aeronautics Act of 1938 making unlawful certain agreements, consolidations, mergers, etc. of air carriers unless approved by the Civil Aeronautics Authority (52 Stat. 1001, 49 U. S. C. § 488), and Sections 3 and 4 of the Bank Holding Company Act of 1956 which make unlawful certain ownership of the voting shares of two or more banks and certain bank mergers (70 Stat. 134, 135, 12 U. S. C. §§ 1842, 1843).

Despite the enactment of other antitrust laws after the Clayton Act, and despite the continued existence of the Federal Trade Commission Act, Congress has not seen fit to amend Section 1 of the Clayton Act to increase the number of statutes that, when violated, subject their violators to private suits for treble damages and injunctions. A bill to amend Section 1 of the Clayton Act to include Section 3 of the Robinson-Patman Act as one of the designated "antitrust laws" was introduced in the 84th Congress, second session (S. 3516) but failed to pass.

This long continued Congressional policy of not extending the meaning of the term "antitrust laws" in Section 1 of the Clayton Act to include subsequently enacted antitrust laws demonstrates a continuing Congressional intent that the definition of "antitrust laws" in Section 1 be exclusive.[5]

5. Congress treated this definition as an exclusive one in Sec. 29 of the Marine Insurance Association Act (41 Stat. 1000, 46 U. S. C. § 885) and in Sec. 414 of the Civil Aeronautics Act (52 Stat. 1004, 49 U. S. C. § 494) in which it referred to the "'antitrust laws' as designated in Section 1 of the" Clayton Act. And in the Bulwinkle Act (62 Stat. 472, 49 U. S. C. § 5b) Congress provided that the term "antitrust laws" had "the meaning assigned to it in Section 1 of the" Clayton Act.

Unless, therefore, Section 3 of the Robinson-Patman Act was so clearly intended by Congress to be part of the Clayton Act as to overcome the presumption against it, it is not one of the "antitrust laws" for violation of which a private action may be maintained for an injunction or for treble damages.

II.

CONGRESS DID NOT INTEND SECTION 3 OF THE ROBINSON-PATMAN ACT TO BECOME PART OF THE CLAYTON ACT.

A. The Text of the Robinson-Patman Act Shows That Congress Did Not Intend Section 3 to Become Part of the Clayton Act.

Respondent's position is that, contrary to the decision of the Court of Appeals for the Tenth Circuit in *Vance v. Safeway Stores, Inc.*, 239 F. 2d 144, the title of the Robinson-Patman Act,[6] its enacting clause, its division into four sections, and particularly its use of quotation marks, all demonstrate Congress intended that Section 3 was not to become part of the Clayton Act.

As was said by Chief Judge Duffy, a former United States Senator (Wisconsin 1933-1939), for the Court below (R. 16):

> "This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as * * *, in each of which quotation marks enclose the portions of those bills which amended existing law while the quotation marks were omitted for those portions of the bills which were not amendments."

6. The Robinson-Patman Act is printed in Appendix I to Petitioner's brief (p. 25). It is correctly reproduced except that there are no indentations of any of the original text (49 Stat. 1526).

The *Vance* decision (p. 146, 239 F. 2d) reasoned that the enacting clause of the Robinson-Patman Act included the statement that "Section 2 of the [Clayton Act] is amended to read as follows:" and (there being no enacting clauses in Sections 2, 3, or 4, held that this enacting clause applied to all four sections of the Act. The Court attributed no significance either to the fact that Sections 2, 3 or 4 are not included in quotation marks, as are subsections "(a)" through "(f)" of Section 1, or to the statement in the title of the Act that the act is one to amend Section 2 of the Clayton Act "and for other purposes". The Court consequently held that all four sections of the Robinson-Patman Act comprised the new text of an amendment of Section 2 of the Clayton Act.[7]

That Court's basic error was in construing the enacting clause to include all of the following language:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 2 of the [Clayton Act] * * * is amended to read as follows:" (Italics not supplied.)

The Court apparently overlooked R. S. § 7 (1 U. S. C. (1934 ed.) § 21), in effect when the Robinson-Patman bill was drafted, which prescribed the form of the enacting clause and stated that it should consist of only the italicized words in the above quotation.[8]

Further, the Court overlooked R. S. § 9 (1 U. S. C. (1934 ed.) § 23), which provided that no enacting words should

7. If this were true, the criminal penalty of Section 3 of the Robinson-Patman Act would apply to violations of Section 2 of the Clayton Act. Section 3 imposes its penalties upon "Any person violating any of the provisions of *this section*". (Italics supplied.)

8. The text of R. S. § 7 is stated, *supra*, in "Statutes Involved". It is now found in 1 U. S. C. § 101.

be used in any section of an act of Congress except the first."

If possible, a statute should not be construed in a way that implies Congress was ignorant of the meaning of the language it employed. *Montclair* v. *Ramsdell*, 17 Otto 147, 152; and it is unnecessary to do so here. Full significance is given to the title of the Robinson-Patman Act, to its division into four sections and to its use of quotation marks if it is construed as follows:

> 1. The enacting clause, as required by R. S. § 7, consists of only the italicized words ending with "* * * *in Congress assembled*", and applies to all four sections of the Act as required by R. S. § 9;
>
> 2. Section 1 of the Act, although necessarily including the enacting clause, by reason of R. S. § 9, actually begins with the words "That section 2 of the [Clayton Act] * * * is amended to read as follows";
>
> 3. The portion of Section 1 in quotation marks—subsections (a) through (f)—comprises all of the text of the amended Section 2 of the Clayton Act; and
>
> 4. Sections 2, 3 and 4 of the Act are to be read as if each were preceded by the enacting clause prescribed by R. S. § 7 and are, therefore, new enactments not part of the Clayton Act.

Acts like the Robinson-Patman Act containing provisions that rewrite the text of existing statutes along with new enactments are not unusual. The same Congress that enacted the Robinson-Patman Act used this form of statute in:

> 49 Stat. 1249, relating to Marine officers;
>
> 49 Stat. 1555, relating to the Migratory Bird Act;

9. The text of § 9 is stated, *supra*, in "Statutes Involved". It is now found in 1 U. S. C. § 103. Emphasis is added to the non-use of quotation marks in Sections 2, 3 and 4 by R. S. § 10 (4 U. S. C. (1934 ed.) § 24), which provided that each section of an Act should be numbered and should contain, as nearly as may be, a single proposition of enactment. The custom of Congress is, however, not to number the first section of an Act.

49 Stat. 1925, relating to the Naturalization Laws; and

49 Stat. 1930, relating to the Welfare of American Seamen.

The Taft-Hartley Act (61 Stat. 136) is also in this form, Title I rewriting existing law and Titles II through V being new enactments. The brief of the petitioner in *Safeway, Inc.* v. *Vance* (No. 69 at the Oct. 1957 term of this Court) cites additional examples (fn. 1, p. 20).

It is significant that Petitioner's argument does not adopt, or even cite, the decision in the *Vance* case. It seemingly repudiates it. Petitioner states at pp. 8, 9 of its brief:

> "The Robinson-Patman Act (49 Stat. 1526) consists of Sec. 1 (consisting of Paragraphs A, B, C, D, E and F) purporting to amend Sec. 2 of the Clayton Act; and Sections 2, 3 and 4."

And at pp. 14-15, Petitioner says of the report (80 Cong. Rec. 9414) of the House members of the House and Senate Conference Committee that drafted the Robinson-Patman Act:

> "It is plain that the report * * * merely calls attention to the fact that Sec. 1 of the bill is the part that amends Sec. 2; and that it was accomplished by dividing Sec. 2 into a number of paragraphs. The report does no more than thus emphasize that Sections 2, 3 and 4 are not substitutes or replacements for what had been *in Sec. 2 of* the Clayton Act; but that Sec. 2 of the Clayton Act was being replaced by what was to be found in Sec. 1 of the bill." [Italics are Petitioner's.]

Petitioner argues that Section 3 of the Robinson-Patman Act deals with the same subject matter as Section 2 of the Clayton Act, discriminatory prices and allowances, and should, therefore, be treated as an amendment of the Clayton Act generally.

Does Petitioner suggest that Sections 2, 3 and 4 of the Robinson-Patman Act were intended to be added to the Clayton Act? When Congress adds sections to an existing Act, it does so in no uncertain terms and states expressly that it is doing so. When, in 1955, additional Sections 4A and 4B were added to the Clayton Act, Congress said that the Clayton Act "is amended by inserting at the end of Section 4 the following new sections" (69 Stat. 282). This identical procedure was followed by the same Congress that enacted the Robinson-Patman Act when it added new sections to existing acts in 49 Stat. 539, 540; 49 Stat. 613, 614 and 49 Stat. 1491, 1492-1497.[10]

More important, however, is the fact that only the first two of the three clauses of Section 3, each of which states a separate offense, deal with discriminatory prices and allowances. The third clause of Section 3, which is that involved here, deals with selling at unreasonably low prices[11] for the purpose of destroying competition or eliminating a competitor, a subject matter more closely related to monopolizing and attempts to monopolize, condemned by Section 2 of the Sherman Act, than to anything found in the Clayton Act.

If Petitioner's argument had validity, the first two clauses of Section 3 would be part of the Clayton Act, the last part would be part of the Sherman Act, and other anti-trust laws such as the Federal Trade Commission Act, the Packers and Stockyards Act, the Tariff Act of 1930, etc.,

10. That Section 2 of the Robinson-Patman Act refers to "this amendatory Act" adds nothing to Petitioner's argument. Obviously, an Act is "amendatory" if *only* one section thereof amends another.

11. The constitutionality of this part of Section 3 has been questioned by some legal writers on the ground that it provides no ascertainable standard of guilt under *U. S. v. Cohen Grocery Co.*, 255 U. S. 81 and *Cline v. Frink Dairy Co.*, 274 U. S. 445. The issue not presented here.

would also be parts of the Clayton, Sherman, and Wilson Tariff Acts.

In support of its contention that the entire Robinson-Patman Act amends the Clayton Act generally (Br. 15-19) Petitioner cites a number of cases from which it quotes language to the general effect that a law is amended when it is permitted to remain and something is added or taken from it, or it is in some way altered to better accomplish its purpose, and that any change of the scope or effect of an existing statute is treated as amendatory. But these cases do not support Petitioner's position. Section 3 of the Robinson-Patman Act stands on its own feet. It contains its own rules of conduct and prescribes its own remedy—criminal penalties—for a violation of its rules. If Section 3 were to be repealed tomorrow it would not affect the Clayton Act by one whit. Section 3 adds nothing to the Clayton Act, takes nothing from it, does not alter it, and in no way changes its scope or effect.[12] This is not the kind of situation dealt with in the decisions cited by Petitioner. Those decisions contribute nothing to the ascertainment of the intent of Congress with respect to the Robinson-Patman Act.

Even if there were no presumption against Petitioner's contention, the text of the Robinson-Patman Act, viewed in the light of applicable statutes and Congressional customs and usages of draftsmanship, shows first, that Section 3 is not part of the amendment of Section 2 of the Clayton

12. This was understood by Congress. Representative Utterback, Chairman of the House members of the Conference Committee that drafted the present form of the Robinson-Patman Act told the House (80 Cong. Rec. 9419):

> "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. *It does not effect the scope or operation of the* prohibitions or limitations laid down by the *Clayton Act* amendment provided for in Section 1. *It authorizes nothing therein prohibited. It detracts nothing from them.*" (Italics supplied.)

Act found in Section 1, which Petitioner does not dispute, and second, that it is a separate enactment, stating its own rules of conduct and providing its own penalties, and is not part of the Clayton Act. That Congress intended this result is shown by its failure to enact S. 3516, 84th Congress, second session, which would have made Section 3 one of the "antitrust laws" designated in Section 1 of the Clayton Act.

Reference to the legislative history supplies added evidence that Congress intended Section 3 not to be part of the Clayton Act.

B. The Legislative History of the Robinson-Patman Act Also Shows That Section 3 Is Not Part of the Clayton Act.

The language now found in Section 3 of the Robinson-Patman Act had its origin in the Borah-Van Nuys bill (S. 4171), which died in the Senate. (This language is referred to hereafter as the "Borah-Van Nuys language.")

While H. R. 8442, which became the Robinson-Patman Act, was pending in the House, an amendment was offered to strike all provisions following the enacting clause and to substitute the Borah-Van Nuys language but the amendment was defeated (80 Cong. Rec. 8226-8227, 8229). When H. R. 8442 was passed by the House, therefore, it intentionally did not contain the Borah-Van Nuys language.

When H. R. 8442 reached the Senate, everything following the enacting clause was stricken and a new text was substituted (80 Cong. Rec. 8418-8419). (This text is printed in full at 80 Cong. Rec. 8418-8419.) The new text was all in one section and rewrote Section 2 of the Clayton Act into eight subsections numbered "(a)" through "(h)".

Subsection "(h)" contained the Borah-Van Nuys language.[13]

If the Robinson-Patman Act had been enacted with this text, the Borah-VanNuys language would have become part of amended Section 2 of the Clayton Act and the provisions of Section 4 and 16 of the Clayton Act authorizing private actions would have been applicable to it.

But H. R. 8442 then went to a Conference Committee which compromised the conflicting views of the Senate and House by drafting what is now the Robinson-Patman Act. The Committee removed the Borah-Van Nuys language from Section 1, where it was part of the amendment of the Clayton Act, and gave it its own section number—Section 3. This deliberate action establishes, in and of itself, that Congress affirmatively intended Section 3 not to become part of the Clayton Act.

The report of the House members of the Conference Committee shows that Section 3 was not part of the Clayton Act. (The report is found at 80 Cong. Rec. 9414-9415.) The report said:

"SECTION 1.

"The first section both of the House Bill and Senate amendment amend section 2 of the Clayton Act and

13. The text which the Senate substituted for that of the House was that of the Robinson bill (S. 3154) as passed by the Senate. (80 Cong. Rec. 8418) and which died in the House. Although, as noted by Petitioner (Br. 31), the Congressional Record shows Senator Borah offered the Borah-Van Nuys language as a separate "section" (80 Cong. Rec. 6349) of S. 3154, the Senator must have actually made the offer as a separate "subsection" because S. 3154 as passed by the Senate unquestionably contained the Borah-Van Nuys language not as a "section" but as a "subsection" of the bill (80 Cong. Rec. 8418, 8419, and see the printed S. 3154 as it passed the Senate). However, this question is of only academic interest because H. R. 8442 as passed by the Senate and sent to the Conference Committee plainly contained the Borah-Van Nuys language as part of Section 1 and hence as part of the amendment of the Clayton Act.

divide said section 2 into a number of subsections. The subsections hereinafter mentioned, therefore, refer to the subsections into which it is proposed to divide section 2 of the Clayton Act.

"Subsection (A).

* * * * *

"Subsection (F).

* * * * *

"SECTION 2.

"* * * Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it [Sec. 2] appears in the conference report as *Section 2 of the bill itself*, rather than as part of *the amendment to Section 2 of the Clayton Act, which is provided for in Section 1 of the present bill.*

"SECTION 3.

"Subsection (h) of the Senate amendment, which was not contained in the House Bill, * * * appears in the conference report as *section 3 of the bill itself*. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1* * * *." (Italics supplied.)

Representative Miller, one of the House Conferees, was asked during the debate on the Conference bill whether section 3 was "a part of the same act" as that part of the bill amending the Clayton Act. (80 Cong. Rec. 9241.) He replied:

"Of course it is, but it is not a part of the Clayton Act as amended by Section 2. [*i. e.* Section 1 of the Robinson-Patman Act.]"

Petitioner has assembled extracts from the debates on the Conference bill (Br. 12, 13, 33-38) which it construes as

showing that Congress intended that a private action for treble damages could be maintained under Section 3. But they are not subject to this construction, whether read separately or together. They go no further than to point out that Congress appreciated the fact that when a single act violated the overlapping provisions of Section 2 of the Clayton Act (Section 1 of the bill) and Section 3 of the Robinson-Patman Act, an injured person could recover treble damages for the violation of Section 2 of the Clayton Act but not for the violation of Section 3 of the Robinson-Patman Act. This is illustrated by the following exchange between Congressmen Celler and Miller at the end of the debate (80 Cong. Rec. 9241 and Pet. Br. p. 38; both were members of the Conference Committee):

> "Mr. Celler: It is possible, of course, for a man to violate section 3 and by that same act be guilty of violation of the other sections of the bill?
>
> Mr. Miller: That would be entirely possible.
>
> Mr. Celler: So that he would be subject to triple damages as well as criminal prosecution?
>
> Mr. Miller: That would be entirely possible."

Mr. Celler, whose remarks earlier in the debate are heavily relied upon by Petitioner (Br. 36-38), thus made it clear that no private right of action exists under Section 3 as such, although an act violating both Section 2 of the Clayton Act (as amended by Section 1 of the Robinson-Patman Act) and Section 3 gives rise to a private action for the Section 2 violation.[14]

The debates on the Conference bill are further analyzed in the brief (pp. 25-30) of the petitioner in the *Safeway*

14. Representative Patman, co-author of the Act, testified May 10, 1950 (Hearing on H. R. 7905, Serial No. 14, Part 5, p. 48, 81st Cong. 2nd Sess.—H. R. 7905 was a bill to amend the Clayton Act) that "Section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in Section 1 of the Clayton Act." *Cf. Labor Board* v. *Dant*, 344 U. S. 375, fn. 13, p. 385.

case (No. 69 at the Oct. 1957 term of this Court). That discussion is not repeated here.

Even, therefore, if there were no presumption against Section 3 becoming part of the Clayton Act by implication, in the words of the Court below (R. 17):

> "The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act."

Thus, the text of the Act, its legislative history and the presumption against Petitioner's position all support the position of Respondent.

C. There Is No Merit to Petitioner's Contention That the House Judiciary Committee Codification of Section 3 of the Robinson-Patman Act Is a Significant Administrative Construction.

Little need be said concerning Petitioner's argument (Br. pp. 19-20) that great weight should be given to the House Judiciary Committee's perpetuation of its error in codifying Section 3 of the Robinson-Patman Act as an "antitrust law" within the designation of Section 1 of the Clayton Act. Not only was the action and nonaction of the House Judiciary Committee not an administrative interpretation, but Petitioner's contention is directly contrary to 61 Stat. 633, 1 U. S. C. § 204 (a)[15] and *Stephan* v. *United States*, 319 U. S. 423, 426, to the effect that provisions of the United States Code may not prevail over the Statutes at Large when the two are inconsistent.

15. Quoted *supra* in "Statutes Involved". It provides the Code shall be only "prima facie evidence" of the law unless the Code has been enacted into positive law. None of Title 15 of the Code, which contains the Clayton and Robinson-Patman Acts, has been enacted into positive law.

III.

THE DECISION OF THE COURT BELOW STATES THE SOUNDER VIEW OF THE DECIDED AUTHORITIES.

The leading authority other than *Vance* holding that a private action may be maintained by reason of a violation of Section 3 of the Robinson-Patman Act is the decision of Judge Yankwich in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796.[16] The Court of Appeals for the Tenth Circuit expressly adopted its "reasoning and conclusions" in its opinion in *Vance* v. *Safeway Stores, Inc.*, 239 F. 2d 144, 146.

The reasoning and conclusions of the *Balian* decision are unsatisfactory in several respects:

1. Its premise (p. 798 of 94 F. Supp.) that when the codifiers consolidated the Robinson-Patman Act into the U. S. Code "they reworded the Section [Sec. 1, Clayton Act] so as to cover *all* the antitrust laws then in existence" [Italics not added] is not well founded as shown heretofore in this brief;

2. Its premise that there was (pp. 801-802 of 94 F. Supp.) a "continuity of the policy evidenced by the history of antitrust legislation to use the triple damage action as an adjunct of governmental enforcement" is not well founded because the Federal Trade Commission Act and the other antitrust laws referred to in point I of this brief do not provide for treble damage actions;

3. Its conclusion (p. 800 of 94 F. Supp.) that "The legislative history of the Robinson-Patman Act is revealing although not entirely conclusive, on the point under discussion" is unaccompanied by any recognition of the refusal of the House to substitute the Borah-Van Nuys language for that of the Patman bill (H. R. 8442) or of the action of the Conference Committee

16. The case was tried and appealed but Section 3 was not in issue on the appeal. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 388 (C. A. 9).

in shifting the Borah-Van Nuys language from subsection (h) of Section 1, where the Senate had placed it, to a separate section not part of the Clayton Act amendment. This implies that the Court may not have been fully informed as to the legislative history; and

4. None of the authorities upon which the decision relies involved the specific issue presented here, as is pointed out in the brief of the petitioner (pp. 32-35) in *Safeway Stores, Inc.* v. *Vance* (No. 69 at the Oct. 1957 term of this Court).

Petitioner relies on dicta of this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 750 and *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, 117-118. In neither of these cases, however, was the private right to sue under Section 3 in issue. In each, the decision is well founded on amended Section 2 of the Clayton Act.

Petitioner also advances an argument that these dicta are a "construction" of Section 3 by this Court which has received Congressional approval through Congressional inaction. Decisions, not dicta, are required to invoke this rule.

Other authorities are analyzed in the petitioner's brief in the *Safeway* case (p. 31 *et seq.*). As shown there and in this brief, the decision of the Court below states the sounder view.

Congress has not left the courts at large to devise every feasible means for protecting the public against acts tending to restrain trade. The judicial function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress. *United States* v. *Cooper Corp.*, 312 U. S. 600, 606.

CONCLUSION.

For the reasons stated, Respondent submits that Section 3 of the Robinson-Patman Act is not one of the "anti-trust laws" designated by Section 1 of the Clayton Act, and that the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Petitioner asks that the judgment be reversed. In no event should the court do more than remand the case to the Court of Appeals for a determination of the other issues presented there but not reached by that Court.

Respectfully submitted,

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September 12, 1957.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

PETITION OF NASHVILLE MILK COMPANY FOR REHEARING.

JEROME F. DIXON,
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PETITION OF NASHVILLE MILK COMPANY FOR REHEARING.

Now comes the above named Nashville Milk Company and presents this, its petition for a rehearing of the above entitled cause, and in support thereof shows the following:

I.

Representative Patman's Statement Given in 1950 Is Not an Aid to Construction.

The opinion of the court relies upon the testimony of Rep. Patman given before a House Committee in 1950 in which he stated that Sec. 3 of the Robinson-Patman Act was not an amendment to the Clayton Act.

It is true that Rep. Patman introduced the Patman bill in the House, portions of which were later included in the Robinson-Patman Act. **However the bill that was passed was written by the Conference Committee.** Rep.

Patman was not a member of the Conference Committee. The House members of the committee were Reps. Utterbach, Miller, Celler, McLaughlin, Summers, Guyer and Robinson. (80 Cong. Rec. 8617.)

The Congressional Record shows that despite the clearly expressed intention of certain members of the Conference Committee the day the bill was debated and passed in the House that Sec. 3 was to become part of the Clayton Act (hereinafter more fully discussed), **Rep. Patman who was present did not raise his voice to the contrary.**

Statements of some members of Congress in conflict with statements of the meaning of statutory construction made by members of committees on the floor of the House and Senate are not to be taken as persuasive of Congressional purpose. (*U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110-125, 1941.)

In the case just cited, the court refused to consider statements made by members of the Senate in conflict with statements made by members of the House and Senate committees. There the statements made in the Senate in conflict with the statements of members of the committees were made at the same session of Congress when the bill was being debated, the conflicting statements being made only a few days apart when the bill was fresh in the minds of all.

Here Rep. Patman not only was not a member of the Conference Committee, but the expression of his opinion which the court has relied upon **occurred 16 years after the Robinson-Patman Act was passed.** It is one thing to construe a statute upon the basis of statements made by a member of Congress who participated as a member of a Conference Committee in the preparation of the bill which became the statute. It is something else to construe a statute upon the basis of a statement made by a member of Congress who was not a member of the Conference Com-

mittee that drew the bill. It is also one thing to construe a statute in the light of a statement made by a member of Congress when the bill that was enacted into law was in the process of being debated and fresh in his mind. It is something else to construe it in the light of a statement made 16 years after the debates had terminated and the law had been enacted. That is comparable to admitting in evidence as part of the *res gestae* an utterance made 16 years after the event by one who was only a bystander to the event and not a participant.

II.

Statements Made on the Floor of the House by Members of the Conference Committee Clearly Establish that Sec. 3 of the Robinson-Patman Act Was to Become a Part of the Clayton Act.

At the beginning of Part II of the opinion the Court states that the legislative history of the Robinson-Patman Act shows that the fair conclusions to be drawn from its legislative history is that it was not intended that Sec. 3 was to become a part of the Clayton Act and that such section was to carry only criminal sanctions, except that price discriminations, to the extent they were common to Sec. 3 and Sec. 2 of the Clayton Act, were also understood to carry under independent force of the Clayton Act the private remedies provided in that Act. Later in Part II, the opinion states that "Further excerpts from the legislative history, set forth in the margin, also bear out the conclusions stated at the outset of this part of our opinion." The margin of the opinion then sets forth quotations from the remarks of Representatives Utterbach and Miller when the bill was being debated in the House. We respectfully submit that these quotations taken out of context do not have the interpretation assigned to them by the court.

The reference in the margin of the opinion to Rep. Miller's remarks is as follows:

> "Rep. Miller, a House Manager of the Committee of Conference, later said, 'Sec. 3 is the Borah-Van Nuys amendment * * * The first section of the bill as reported back here amends Sec. 2 of the Clayton Act.' When asked whether Sec. 3 was 'a part of the same act,' Mr. Miller replied (80 Cong. Rec. 9421): '*Of course it is, but it is not a part of the Clayton Act as amended by Sec. 2* (Sec. 1 of the Robinson-Patman Bill.)' (Italics added.)"

In the Appendix B of our original brief (pp. 36-38) we set up in full the remarks in the House of which the foregoing quotations are a part.

These remarks show that Rep. Celler, a member of the Conference Committee, stated without challenge that a violator of Sec. 3 would have to respond in triple damages under the Clayton Act; and Rep. Miller likewise agreed. No member of the House took issue in that respect with either Rep. Miller or Rep. Celler.

The remarks set forth in Appendix B also show that Reps. Massingale and Hancock (not members of the conference committee) were concerned with whether the bill provided for criminal violations for infractions of Sec. 1 of the bill, or whether the criminal penalties were limited to a violation of Sec. 3. It was this discussion which induced the statement by Rep. Miller quoted in the margin of the opinion. Rep. Miller was not called upon to state whether Sec. 1 alone amended the Clayton Act. This is clearly shown by the inquiries to Rep. Miller and his responses which the opinion does not consider in their context. The following (See Appendix B, pp. 38-39 of our original brief) is the full context, with emphasis supplied:

> "Mr. Massingale. Does the bill agreed to by the conferees carry the penalty of triple damages and also a penalty under the criminal law?

Mr. Miller. The penalty of triple damages is the old law. In other words we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of this bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of Section 2 of the Clayton Act as amended. *Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section*, and I believe that is a reasonable construction if you will look at the bill.

Mr. Massingale. There is no criminal offense involved for anything outside of what is contained in that section?

Mr. Miller. In Section 3.

Mr. Hancock of New York. *Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject to triple damages to any one who claims to be aggrieved?*

Mr. Miller. *That is true, but the criminal part is included in Section 3 and Section 3 only.*

Mr. Hancock of New York. *But is it a part of the same act?*

Mr. Miller. *Of course it is*, but it is not a part of the Clayton Act as amended by Section 2. It ought to be as far as that is concerned, if a seller willfully discriminates."

It is plain from the foregoing that what Rep. Miller stressed was that violations of the criminal provisions were limited to Sec. 3; and that when he stated that Sec. 3 was not a part of the "Clayton Act as amended by Section 2", he meant that **only Sec. 1 of the bill amended Sec. 2 of the Clayton Act**; and that **Sec. 3 of the bill did not amend Sec. 2 of the Clayton Act** or impose criminal sanctions for a violation of Sec. 2. He did not say that Sec.

1 of the bill was the sole amendment of the Clayton Act. Neither did he say either directly or by inference that Sec. 3 did not amend the Clayton Act. If he had any such intention it would have been in direct contradiction of his concession to Rep. Hancock as just given and later to Rep. Celler that a violator of Sec. 3 would be subject to triple damages. (See our original brief, Appendix B, p. 38.) It would have been likewise in contradiction of his later statement in which he asserted, "Mr. Speaker, I want to say that Congress really *wants a bill amending the Clayton Act.*" (See our original brief, Appendix B, p. 38, with emphasis supplied) in which he clearly did not isolate Sec. 1 as the sole amendment of the Clayton Act, **but regarded the entire bill as an amendment to the Clayton Act.**

An examination of the quotation from Rep. Utterbach given in the margin of the opinion in which he stated that Sec. 3 of the bill which imposed criminal penalties did not affect the operation of the "Clayton Act amendment provided for in Sec. 1", gives the same conclusion as those we have just reached from Rep. Miller's remarks. Rep. Utterbach was only stressing what Rep. Miller stressed, namely, that only Sec. 1 of the bill amended Sec. 2 of the Clayton Act; and that the criminal sanctions of Sec. 3 would not be added to a violation of the Clayton Act as amended by Sec. 1.

III.

The Report of the Conference Committee Carries No Evidence that Sec. 3 Was Excluded as an Amendment of the Clayton Act.

The court stresses portions of the Conference Committee report in Part II of the opinion in support of its conclusion previously noted that the legislative history supports the

view the court takes. We respectfully submit that the parts of the report given in italics in the opinion should not be given the construction placed upon them in the opinion.

It is significant that nowhere does the report state that Sec. 3 of the bill was not to become a part of the Clayton Act or exclude it as such an amendment. A reading of the report (80 Cong. Rec. 9414-9415) will disclose that it merely stresses that it is Sec. 1 of the bill that amends Sec. 2 of the Clayton Act and that the amendment to Sec. 2 was obtained by dividing former Sec. 2 into a number of separate paragraphs. The report only emphasizes that Secs. 2, 3 and 4 of the bill are not to be regarded as replacements for what was in Sec. 2 of the Clayton Act. It stresses that only Sec. 1 of the bill was to replace Sec. 2 of the Clayton Act. The report, additionally, harmonizes Secs. 1 and 3 of the bill by pointing out although they overlap in some respects, there was no inconsistency with the provisions of Sec. 2 of the Clayton Act which were to be amended by Sec. 1 of the bill.

Rep. Utterbach opened the debate upon the report with a lengthy explanation of its provisions that extends over 4 pages of the Congressional record (80 Cong. Rec. 9415-9419). Our comments on the report just given are no more than a summary of his explanation.

IV.

The Court's Opinion Failed to Consider Relevant Remarks by Senator Borah.

In view of the fact that the Borah-Van Nuys amendment to the Robinson bill in the Senate (S. 3154) eventually became Sec. 3 of the Robinson-Patman Act (absent its second paragraph only which became Sec. 4 of the Robinson-Patman Act), the remarks of Senator Borah when

he introduced his amendment in the Senate are relevant. They are not referred to in the opinion of the court.

An examination of Senator Borah's remarks (See p. 12 of our original brief) leaves no doubt but that he intended that his amendment should give a party injured by its violation a civil action for damages.

Senator Borah was a Senate member of the Conference Committee. (80 Cong. Rec. 8617.) It is altogether unlikely that a man of his well recognized convictions would have subordinated his amendment in the Conference Committee bill to a provision with criminal sanctions only, at least without a later explanation. As a member of the Conference Committee he participated in the writing of the bill. The Congressional record shows that he was present in the Senate and participated in the discussion when the Conference Committee report was approved. (80 Cong. Rec. 9903.) Nowhere in the record did he state that Sec. 3 did not furnish a civil cause of action to a party injured by a violation of Sec. 3. Had it been the intention of the Conference Committee to cut down Sec. 3 to a provision with criminal sanctions only, it is difficult to believe that Senator Borah would not have explained to the Senate that the section was intended to impose criminal sanctions only and his reasons for agreeing to such a drastic change.

V.

The Very Nature of the Robinson-Patman Act Itself Supports the View that the Entire Act Was an Amendment to the Clayton Act.

The opinion of the court did not consider the strong internal proof furnished by the Robinson-Patman Act itself that the entire act by its very nature was an amendment of the Clayton Act. That it is so is clear from the following analysis:

First: The act consists of 4 sections. Sec. 2 (which preserved pending causes of action under Sec. 2 of the Clayton Act prior to its amendment by Sec. 1 of the Robinson-Patman Act) characterized the act four times as "this amendatory Act." Congress did not limit its characterizing language to any one section. It thus described **the entire act** as one of an amendatory nature.

Second: An act may amend a prior act even though the later act is not stated to be an amendment of the earlier one. A law is amended when something is added to it or taken away to better accomplish its purpose. Supplemental statutes include every species of amendatory legislation which complete a legislative scheme. (See authorities cited pp. 17-18 of our original brief.)

Third: Sec. 4 exempts cooperative associations from the operation of the entire Robinson-Patman Act. Its provisions plainly apply to Sec. 2 of the Clayton Act (as amended by Sec. 1 of the Robinson-Patman Act) **and it therefore clearly amended and became a part of the Clayton Act.** The cooperative exemption (Sec. 4) also plainly applies to Sec. 3, **thus modifying the operation of the latter.** If Sec. 3 did not amend and become a part of the Clayton Act, it would be contrary to ordinary legislative practice. See 4, which is a part of the Clayton Act, would reach out of the Clayton Act and impair and limit the operation of a separate act which was passed in the same bill. If Sec. 3 is not a part of the Clayton Act, then we must go to another act of Congress (the Clayton Act) to find its limits and find there those limits impaired and modified by the cooperative exemption of the Clayton Act.

Fourth: All parts of the Robinson-Patman Act (Sec. 1 forbidding certain acts, Sec. 2 preserving pending actions, Sec. 3 forbidding certain acts and Sec. 4 exempting co-operatives) are integrated parts of a whole. All deal with monopolistic practices of the same general nature in

the sale of goods. All acts forbidden by Sec. 3 except one (selling at unreasonably low prices to destroy competition) are likewise forbidden by Sec. 1. The single act forbidden by Sec. 3 which is not forbidden by Sec. 1 is in the same area as the monopolistic practices forbidden alike by both sections. It would be an anomaly for Congress to have intended to isolate Sec. 3 from the Clayton Act for the sole reason that a single provision in the latter **(akin although not identical to the forbidden provisions in Sec. 1)** is not to be found in Sec. 1.

VI.

There Is Nothing Inconsistent Between the Title of the Robinson-Patman Act and the Amendment of the Clayton Act by Sec. 3.

It is entirely consistent for Congress to have intended that Sec. 3 should amend and become a part of the Clayton Act regardless of the title employed professing to be an Act "To amend section 2 of (the Clayton Act) * * * *and for other purposes.*" The "other purposes" were plainly for the purpose of adding the three additional sections to the Clayton Act which are found in the Robinson-Patman Act. The express reference in the title to the amendment of one named section of the Clayton Act (Sec. 2) would not exclude the intention of Congress of *adding* the three additional sections by way of amendment. Nothing in the phrase "other purpose" excludes the purpose of adding three additional sections. From the reading of the title in conjunction with the body of the act it is clear that Congress had two purposes. One was to make a direct amendment of Sec. 2 of the Clayton Act. The other was to add by way of amendment the three additional sections. Any other construction of the title would exclude the addition to the Clayton Act by way of amendment of not

only. Sec. 3 of the Robinson-Patman Act but Secs. 2 and 4 as well. The intention of Congress of adding all three additional sections to the Clayton Act is well within the framework of the phrase "other purposes."

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Court of Appeals, 7th Circuit, upon further consideration be reversed.

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CERTIFICATE OF COUNSEL.

I, Jerome F. Dixon, counsel for the above named petitioner, Nashville Milk Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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